

1004
No. 2745

**United States
Circuit Court of Appeals**

For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Arizona.

Filed

APR - 4 1916

F. D. Monckton,

Clerk
Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the Superior Court of the State of Arizona, in an
for the County of Maricopa.*

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Complaint.

Comes now the plaintiff, by Messrs. Hayes & Laney, his attorneys, and complaining of the defendant, for cause of action says:

I.

That the plaintiff is a resident of Maricopa County, Arizona, and that the defendant is now and was during all the times hereinafter referred to, a corporation and a common carrier, maintaining offices and doing business within and between the States of California and Arizona, owning property and conducting business in Maricopa County in the State of Arizona, and having an agent and representative within said Maricopa County, and engaged, among other things, in the transportation of freight for hire.

II.

That on the 1st day of July, 1913, and during all the other times hereinafter referred to, the plaintiff was the owner of one hundred and fifty-two (152) head of dairy cows; that on said 1st day of July, 1913, the plaintiff delivered said cows and all thereof to the agent of the defendant at San Luis Obispo,

California, for carriage to Phoenix, Arizona; that said cows were at the time of said delivery, robust, healthy, and in every way in first-class physical condition. That said agent on behalf of said defendant as a common carrier for hire, [3*] accepted said cows at said San Luis Obispo, California, a station on the defendant's line, and in consideration of the freight to be paid to the defendant for said services as measured by the rate applicable to the shipment and carriage of livestock in carload lots from said San Luis Obispo, California, to Phoenix, Arizona, as published and on file with the Interstate Commerce Commission, undertook to carry and transport said cows to Phoenix, Arizona, and to make delivery of said cows and all thereof to this plaintiff in good condition at said Phoenix, Arizona.

III.

That when said defendant company accepted the delivery of said cows, and undertook to transport them for the plaintiff from San Luis Obispo, California to Phoenix, Arizona it owed to the plaintiff the duty of transporting said cows safely between said points, and delivering said cows to the plaintiff at Phoenix, Arizona, in good condition; that the defendant in violation of its duty to the plaintiff to safely transport said cows to Phoenix, Arizona, and to deliver them to the plaintiff at Phoenix, Arizona in good condition handled and transported said cows in such grossly negligent and careless manner as hereinafter set forth, that five of said cows died as

*Page-number appearing at foot of page of original certified Record.

a result thereof, at Yuma, Arizona, a station on the line of said Southern Pacific Company, and the remainder thereof, to wit: One hundred forty-seven (147) head of said cows were delivered to the plaintiff at Phoenix, Arizona, in such crippled, sick and injured condition, that six more of said cows died within a few days after said delivery, and eighty-seven (87) head thereof were seriously injured and depreciated in value, as *as* the direct result of the grossly negligent handling and transportation of said cows, as hereinafter particularly set forth. [4]

IV.

That the plaintiff accompanied said shipment of cattle from San Luis Obispo, California to Yuma, Arizona, a station on the line of the defendant company; that said shipment arrived at Yuma, Arizona, at ten o'clock A. M. on the 4th day of July, 1913, said cows being at the time of their arrival in Yuma, Arizona, in perfect physical condition; that upon their arrival at Yuma, the defendant by its agent at said station requested this plaintiff to unload said cows at said station; that the weather at Yuma, Arizona at said time was extremely hot, and the stockpens in which said cows were to be placed were very dusty and entirely unprotected from the rays of the sun, all of which facts were well known to said agent of this defendant; that this plaintiff in response to said request, advised said agent that through one A. R. Gatter, an agent and representative of the defendant company at Phoenix, Arizona, he had arranged to meet the train upon which said cows were

being transported over the lines of the defendant company, at Maricopa, Arizona, a station on the line of the defendant company, with a train upon which said cows were to be transferred and immediately transported to Phoenix, Arizona; and the plaintiff further warned the agent of the defendant company at Yuma, that to unload said cows at said station and to place the same in the company's stock-pens under the conditions above set forth, would result in serious injury and possible death of said cattle, to the damage of the plaintiff. The plaintiff further advised said agent of the then good condition of said cattle, and that by permitting them to be transported through to Maricopa, Arizona, on the train to which said cattle were attached, would protect them from the rays of the sun and the extreme heat to which they would be exposed at the station of Yuma, and would permit of their unloading at Phoenix, Arizona, during the evening of the said [5] 4th day of July, and would in every way protect them from exposure and injury; that the train on which said cattle had been transported to Yuma, arrived at Maricopa at 7:15 P. M. of said 4th day of July, and an engine and crew were waiting at said station of Maricopa in conformity with the arrangements made through said Gatter to transfer said cattle from there to Phoenix, and had the instructions and requests of the plaintiff herein been obeyed, said cattle would have arrived at Phoenix, at an hour not later than 10:00 P. M. of said 4th day of July, 1913, and would by such arrangement have been completely protected from the heat of the sun,

and would have been delivered to the plaintiff at Phoenix, Arizona, at such hour as to avoid their exposure to the heat of the sun; that notwithstanding plaintiff's request and the reasons expressed therefor, the said agent of the defendant company at Yuma, again demanded of the plaintiff that the said cows be then and there unloaded; that the plaintiff thereupon refused to unload his said cows at said place for the reasons aforesaid, and again warned said agent of the injury that would result to them from his proposed action, and that his company would be held strictly responsible for all damage and loss resulting therefrom to the plaintiff; that notwithstanding said warning from the plaintiff of the injury and loss that would result to the plaintiff, and the plaintiff's refusal to unload or assist in unloading said cows, said defendant, through its agent and employees, unloaded said cows and placed them in the stock-pens of the defendant, under the conditions above set forth; that said cows remained in said pens, exposed to the extreme heat and dust as above set forth, from 11:00 A. M. on the 4th day of July, 1914, until about 7:00 P. M. of said day. That as a direct result thereof, five of said cows [6] died at Yuma, on said 4th day of July, and all the remainder thereof as the result of said unloading and handling as above set forth, were so injured that six head thereof died shortly after this delivery to the plaintiff at Phoenix, Arizona, and eighty-seven (87) head thereof by reasons of the injuries so received, and as the direct result of said negligent conduct on the part of the defendant company as afore-

said, were overheated, rendered sick and lame, and greatly reduced in value; that said cows so injured and killed were all of the reasonable market value of Eighty-five Dollars (\$85) per head; that by reason of the death of the eleven cows as aforesaid, plaintiff has been damaged in the sum of Nine Hundred and Thirty-five Dollars (\$935), and by reason of the injuries to said 87 cows as aforesaid, their market value was depreciated \$20 per head, resulting in direct loss and damage to the plaintiff in the sum of Seventeen Hundred and Forty Dollars (\$1,740); that the plaintiff incurred expenses and outlay for the nursing of said cows in the sum of \$20.

V.

That after said injuries and prior to the institution of this action, and as soon as the plaintiff was able to determine the extent of his injury and damage, the plaintiff made demand upon the defendant company for the sum of Two Thousand Six Hundred Ninety-five Dollars (\$2,695) in full satisfaction of the damage and injury to the plaintiff, by reason of the negligence of the said defendant company as above set forth, which said demand was refused.

WHEREFORE, plaintiff prays judgment against the defendant;

1. For the sum of Two Thousand Six Hundred and Ninety-five Dollars (\$2,695) as compensatory damages for his loss as above set forth. [7]

2. For the sum of One Thousand Dollars (\$1,000) as punitive or exemplary damages.

3. For his costs herein incurred.

HAYES & LANEY,
Attorneys for Plaintiff.

[Endorsed]: No. 8603. Filed Jul. 2, 1915.
James Miller, Jr., Clerk Superior Court.

[Endorsements]: Filed Jul. 23, 1915 at — M.
George W. Lewis, Clerk. By Aileen Russell, Dep-
uty. [8]

[Summons.]

*In the Superior Court of the County of Maricopa,
State of Arizona.*

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Action brought in the Superior Court of the County
of Maricopa, State of Arizona, and the Com-
plaint filed in said County of Maricopa in the
Office of the Clerk of said Superior Court.

In the Name of the State of Arizona, to Southern
Pacific Company, a Corporation, Defendant,
GREETING:

YOUR ARE HEREBY SUMMONED and re-
quired to appear in an action brought against you by
the above-named plaintiff in the Superior Court of
the county of Maricopa, State of Arizona, and an-
swer the Complaint therein filed with the clerk of
this said court, at Phoenix, in said county, within

twenty days after the service upon you of this Summons, if served in this said county, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Given under my hand and the seal of the Superior *County* of the county of Maricopa, State of Arizona, this second day of July, 1915.

[Seal]

JAMES MILLER, Jr.,

Clerk of said Superior Court.

Office of the Sheriff,
County of Maricopa,—ss.

I HEREBY CERTIFY that I received the within summons on the second day of July, A. D. 1915, at the hour of 5 P. M., and personally served the same on the third day of July, A. D. 1915, on [9], Southern Pacific Company, a Corporation being the defendant named in said Summons, by delivering to R. A. *Gstter*, General Agent for said Southern Pacific Company, a corporation, in the county of Maricopa, a copy of said Summons, to which was attached a true copy of the Complaint mentioned in said Summons.

Dated this third day of July, A. D. 1915.

J. D. ADAMS,

Sheriff.

By J. T. Murphy,

Deputy Sheriff.

Fees, Service	\$
Copies	\$1.00
Travel 1 miles,.....	\$.20
Publication	\$—
Total.....	\$1.20

[Endorsed]: No. 8603. Filed July 6, 1915.
James Miller, Jr., Clerk. By Jennie Smith, Deputy
Clerk.

[Endorsements]: Filed July 23, 1915, at — M.
George W. Lewis, Clerk. Aileen Russell, Deputy.
[10]

[Order Continuing Hearing on Demurrer.]

*In the United States District Court for the District
of Arizona.*

Minute Entry Appearing Under Date of Monday,
September 20, 1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC CO.,

Defendant.

IT IS ORDERED by the Court that the hearing
on the demurrer herein be postponed until Monday,
the 4th day of October, A. D. 1915, at Phoenix, Ari-
zona, in pursuance of stipulation of counsel. [11]

[Order of Submission of Demurrer.]

*In the United States District Court for the District
of Arizona.*

Minute Entries Appearing Under Date of October
5th, 1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC CO.,

Defendant.

The hearing on the plaintiff's demurrers to the defendant's pleas in bar came on regularly this day, the plaintiff appearing by P. H. Hayes, Esquire, and the defendant appearing by F. H. Hartman, Esquire, and J. C. Forest, Esquire, and the said demurrers are argued by counsel and submitted to the Court for decision thereon and the Court takes the same under advisement.

[Order Assigning Cause for Hearing.]

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC CO.,

Defendant.

With the consent of counsel for both sides, IT IS
ORDERED that this case be set down for trial on

October 15, 1915, at 9:30 o'clock, A. M., subject to the ruling of the Court on the demurrers of the plaintiff to the defendant's pleas in bar, this day argued and submitted to the Court and not yet decided. [12]

[Order Sustaining Demurrer to First and Second Pleas, etc.]

In the United States District Court for the District of Arizona.

Minute Entry Appearing Under Date of October 9th,
1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC CO.,

Defendant.

The demurrers of the plaintiff to the defendant's pleas in bar having been argued by counsel and submitted to the Court on a former day of this term and the Court having maturely considered the same,

IT IS ORDERED that the said demurrers to the first and second pleas in bar of the defendant be and the same are hereby sustained, to which ruling of the Court the defendant excepts and asks that its exception be noted upon the record and the same is accordingly done. [13]

**[Order Permitting Filing of Defendant's Amended
Answer, etc.]**

*In the United States District Court for the District
of Arizona.*

Minute Entry Appearing Under Date of October 11,
1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PAC. CO.,

Defendant.

Upon motion of the defendant by counsel, IT IS ORDERED that the defendant be permitted to file its amended answer herein, and the said amended answer having been filed together with pleas in bar to the plaintiff's complaint, IT IS ORDERED, on application of plaintiff, that the plaintiff be permitted to file his demurrer and answer to the said pleas in bar and that the said demurrers be set down for argument on October 12, 1915, at two o'clock P. M.
[14]

*In the United States District Court for the District
of Arizona.*

No. 142 (PHX.)

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Defendant's Second Amended Pleas and Answer.

Now comes the above-named defendant, Southern Pacific Company, and files this, its second amended pleas and answer and says:

FIRST PLEA IN BAR.

That defendant is now and was during all of the times mentioned in plaintiff's complaint herein a common carrier by railroad, engaged in interstate commerce and operating a line of railroad extending through the States of California and Arizona, and other States.

That heretofore, on or about July 1, 1913, this defendant, in its capacity as such common carrier, received from plaintiff at the said town of San Luis Obispo, in the State of California, those certain 152 head of cows, being the same animals as mentioned and described in plaintiff's complaint herein, for transportation over its said line of railroad and its connecting carrier, to wit, Arizona Eastern Railroad Company, from the said town of San Luis Obispo to the city of Phoenix, in the State of Arizona.

That in the course of such transportation, and on July 2, 1913, at 2:35 P. M., the said cattle were by this defendant unloaded for feed and rest at the city of Los Angeles, State of California, at a station on defendant's said line of railroad, [15] and thereafter, and without any unusual delay were again loaded into cars of this defendant, on July 3, 1913, at about 3:40 P. M., and forwarded from the city of Los Angeles, on said date, and were transported by this defendant in its said cars, on its said line of railroad, from the said city of Los Angeles, without any unusual delay and without any negligence whatever on the part of defendant, to the town of Yuma, in the State of Arizona, a station upon defendant's said line of railroad. That said cattle arrived at the said station of Yuma, in the State of Arizona, at about the hour of 10:35 A. M. of July 4, 1913.

That at the time said cattle so arrived at the said station of Yuma, in the said State of Arizona, they had been confined in said cars for about twenty *hour* without feed or rest, and that it was absolutely necessary for defendant to unload said cattle at the said town of Yuma for feed and rest, in order to comply with the provisions of that certain Act of Congress entitled "An Act to Prevent Cruelty to Animals While in Transit by Railroad or Other Means of Transportation from One State, Territory or the District of Columbia into or Through Another State, Territory or the District of Columbia," etc., approved June 29, 1906, 34 Stat. L., p. 607, 1909 Supp. Fed. Anntd. Stats., p. 43.

That defendant did so unload said cattle at the said

station of Yuma for feed and rest for the purpose of complying with the provisions of said Act of Congress; and that without violating said Act of Congress it was impossible for defendant to have transported said cattle any farther than said station of Yuma, before unloading same for feed and rest, in this, to wit, that if said cattle had not been so unloaded, but had been transported to destination, without unloading for feed and rest at Yuma, Arizona, it would have resulted in the cattle having been [16] confined in the said cars in excess of twenty-eight consecutive hours.

That plaintiff did not, nor did anyone for him, upon the arrival of said cattle at the said town of Yuma, Arizona, or at any other time or place, file with or tender to this defendant or any of its agents any written request, separate and apart from any printed bill of lading or other railroad form, extending the time which said animals could be confined from twenty-eight to thirty-six hours, as provided by said statute.

That defendant had at said time properly equipped stock-pens and stock corrals at a certain station on its said line of railroad known as Gila, Arizona, a distance of 123 miles easterly from the said town of Yuma and in the direction in which said cattle were being transported, but that neither this defendant nor its connecting carrier, the said Arizona Eastern Railroad Company had at said time any stock-pens or corrals at the station of Maricopa, Arizona, the point at which said cattle were to be delivered by this defendant to its said connecting carrier, said

Arizona Eastern Railroad Company, for transportation by said Arizona Eastern Railroad Company to destination, the said city of Phoenix, into which said cattle could have been unloaded for feed and rest.

That upon the arrival of said cattle at the said town of Yuma, Arizona, this defendant was willing and anxious and offered to transport said cattle for plaintiff on to the said station of Gila, upon its said line, there to be unloaded for feed and rest, but that plaintiff absolutely refused to permit *plaintiff* to do so.

That thereupon and immediately upon the arrival of said cattle at the said station of Yuma, Arizona, on July 4, 1913, at about 10:35 A. M., this defendant notified its said connecting [17] carrier, to wit, said Arizona Eastern Railroad Company, by telegraph, that said cattle were then at said town of Yuma, en route to Phoenix, Arizona, and requested information from the said Arizona Eastern Railroad Company if it could handle said cattle if this defendant should transport said cattle on to said station of Maricopa from the said town of Yuma without feed and rest, and the said Arizona Eastern Railroad Company notified, advised and informed this defendant that it could not so handle said cattle from the said station of Maricopa, Arizona, to the place of destination, to wit, Phoenix, Arizona, and that it, the said Arizona Eastern Railroad Company did not and would not have any facilities at the said station of Maricopa upon the arrival of said freight-train so containing said cattle, if the said cattle should be brought

to the said station of Maricopa without unloading for feed and rest, to enable it, the said Arizona Eastern Railroad Company to transport said cattle from the said station of Maricopa to destination at Phoenix, Arizona, within thirty-six hours from the time said cattle were so loaded at the said city of Los Angeles, State of California, as hereinbefore set forth; and that by reason of the foregoing facts it was necessary for this defendant, in order to comply with the said Act of Congress known as the Twenty-eight Hour Law, to unload said cattle at the said town of Yuma for feed and rest, even though plaintiff had filed with this defendant a written request, as proved by said act, extending the time which said animals could be confined from twenty-eight to thirty-six hours, which this defendant specifically denies.

That at the time of the arrival of said cattle at the said town of Yuma, on account of the extreme heat at that place and in the country through which they had been transported, they were in no condition to be kept in the cars any longer and [18] were in no condition to withstand further shipment without feed and rest.

That defendant, thereafter, and on the same day, to wit, July 4, 1913, reloaded said cattle into its said cars at the said station of Yuma and forwarded the same to destination over its said line of railroad and the line of its connecting carrier, to wit, the said Arizona Eastern Railroad Company, to the city of Phoenix, State of Arizona, without any unusual delay and without any negligence whatsoever on its part.

That by reason whereof plaintiff is not entitled to recover any damages from this defendant for the matters and things set forth in his said complaint.

WHEREFORE, defendant prays for judgment that plaintiff take nothing by his action herein and that defendant have judgment for its costs.

FRANCIS M. HARTMAN,

Tucson, Arizona,

J. C. FOREST,

Phoenix, Arizona,

Attorneys for Defendant. [19]

SECOND PLEA IN BAR.

And defendant, for another and further plea in bar, to that portion of plaintiff's complaint wherein he is seeking to recover damages for six head of said cattle, which plaintiff alleges died shortly after delivery at destination in the sum of eighty-five dollars per head, to wit, five hundred ten dollars; and for eighty-seven head which plaintiff alleges were damaged in the sum of twenty dollars each, to wit, seventeen hundred forty dollars; and for twenty dollars which plaintiff alleges he paid out for nursing said cattle, says:

That heretofore, on or about July 1, 1913, this defendant, as a common carrier, received from plaintiff at the town of San Luis Obispo, in the State of California, those certain 152 head of cows, as mentioned and described in plaintiff's complaint, for transportation, in five cars, to the city of Phoenix, in the State of Arizona, over the line of railroad operated by defendant and its connecting carriers, under three certain contracts in writing, then and

there made and entered into by and between plaintiff and his duly authorized agents, to wit, one Frank E. Whitten and one James Ford, and this defendant, which said contracts were identical in form and the contents of each were the same with the exception that one of said contracts was executed by the said Frank R. Stewart, in person and covered sixty head of said cattle, contained in two of said cars; one of said contracts was executed by the said Frank E. Whitten, the duly authorized agent of and for and on behalf of said Frank R. Stewart, the owner of said cattle, and covered sixty-two head of said cattle, contained in two of said cars; and the other of said contracts was executed by the said James Ford, the duly authorized agent of and for and on behalf of the said Frank R. Stewart, the owner of said cattle, and covered [20] thirty head of said cattle, contained in one of said cars; true and correct copies of which said contracts are attached hereto and made a part hereof, marked exhibits "A," "B" and "C," respectively.

That the original copies of each of said contracts were by this defendant, at the time and place of execution thereof, to wit, on July 1, 1913, at San Luis Obispo, California, delivered to plaintiff, and defendant is informed and believes and upon such information and belief alleges that plaintiff now has the same in his possession or control.

That the said Frank R. Stewart, although being the owner or claiming to be the owner of all of said cattle, shipped sixty-two head of said cattle in the name of said Frank E. Whitten and thirty head of

said cattle in the name of said James Ford.

That in transporting said shipment of cattle this defendant fully performed each and every act on its part required to be performed by the terms and provisions of said contracts and by the published freight tariffs governing such shipments, and if any loss or injury occurred to said livestock, as alleged in plaintiff's complaint, all of which this defendant expressly denies, this defendant is exempt from liability therefor under the terms and stipulations set forth in said agreements.

That under and by virtue of the terms of said contracts and each of them plaintiff herein agreed and bound himself that in case any loss or damage should be sustained for which this defendant might be liable that then this plaintiff should make demand or claim therefor in writing to the freight claim agent of this defendant within ten days after the unloading of said cattle at destination, to wit, at the city of Phoenix, State of Arizona, and that in the event of the failure of plaintiff [21] to do so all claims for loss or damage in the premises were thereby expressly waived, released and made void.

That said cattle were unloaded by plaintiff and received and taken and driven away by him on the 5th day of July, 1913, at destination, to wit, at the city of Phoenix, Arizona, and that plaintiff did not, nor did anyone for him or on his behalf, within ten days after so unloading said cattle at destination, make any demand or claim in writing to the freight claim agent of this defendant or to this defendant or to any agent of this defendant company for any

loss or damage to said shipment of cattle.

That it was entirely possible for plaintiff to have given such notice, and that this defendant at all the times mentioned in plaintiff's complaint had an agent at the said city of Phoenix, State of Arizona, at the place where said cattle were unloaded, as set forth in plaintiff's complaint, and that said defendant had at all of said times many agents in said State of Arizona, and in the State of California to whom such notice could have been given.

That by reason of the failure of plaintiff or anyone for him or on his behalf to make any claim in writing within ten days after the unloading of said cattle, to the freight claim agent of this defendant or to any agent of this defendant, as aforesaid, for any loss or damage to any of said cattle, that plaintiff thereby expressly waived and released any and all claims whatsoever against this defendant on account of any loss or damage to said cattle, if said cattle were damaged as alleged.

That by reason of the failure of plaintiff to give such notice in manner and form as required by said agreement that he is not entitled to recover in this action for the six [22] head of cattle alleged to have died shortly after delivery, nor for damages in the sum of twenty-dollars per head for eighty-seven head alleged to have been injured, nor for the said sum of twenty dollars alleged to have been paid out for nursing said cattle.

WHEREFORE, defendant prays that plaintiff take nothing by his action herein for said matters and things above set forth.

FRANCIS M. HARTMAN,

Tucson, Arizona,

J. C. FOREST,

Phoenix, Arizona,

? Attorneys for Defendant. [23]

C. J. JONES
GENERAL FREIGHT AGENT
SOUTHERN OBT.-PACIFIC SYSTEM
SAN FRANCISCO, CAL.

SOUTHERN PACIFIC COMPANY-PACIFIC SYSTEM
C. W. LUCE,
FREIGHT TRAFFIC MANAGER,
SAN FRANCISCO, CAL.

J. C. STUBBS,
GENERAL FREIGHT AGENT,
SOUTHERN OBT.-PACIFIC SYSTEM,
LOS ANGELES, CAL.

LINE STOCK SHIPPING ORDER CONTRACT AND BILL OF LADING

SPECIAL AGREEMENT

San Luis Obispo

Station

July 1 - 1913

No. 157

191

Agent, Southern Pacific Company:

Please forward the following described Live Stock at declared valuation per head hereinafter set forth, and under conditions shown on back hereof, and also subject to the conditions hereinafter more particularly set forth, all of which provisions and conditions have been read by the undersigned and are clearly understood and accepted, and are hereby expressly made a part hereof and agreed to by the undersigned in consideration of the special rate which is thus attained, and of divers other good and sufficient considerations, herein stated and hereby acknowledged.

Frank R Stewart.

(Consignor)

Phoenix, Ariz

Destination

By rail
Initial No. CAR
SP 3 MLT 14398
SP 4 GH 14673

If consignee fail for any cause to take delivery of this shipment for a period of five days after arrival thereof at destination, or at any other intermediate point in case of accident, the Southern Pacific Company or its Agent is hereby authorized to sell said shipment at public auction to the highest bidder, five days after sending notice to shipper by telegraph, of such intent to sell because of such failure to take delivery, unless within five days after sending said notice consignee or owner pay charges and take delivery thereof.

Number of Head	DESCRIPTION	Declared Value per Head to be entered by Shipper
	Horses, Ponies	
	Mules, Jacks	
	Cows (under 127)	
	Oven-bulls, Steers	
60	Cows	30.00
	Calves	
	Hogs	
	Sheep, Goats	
	Cattle, Range	

If the declared value per head is not declared by the shipper, it is understood and assumed that the value is as printed in specific figures on the reverse side of this contract for Ordinary Live Stock.

Page

Witness Frank R Stewart.

Shipper

WHEN NEXT made at the station and on the date above named, by and between Southern Pacific Company, hereinafter called first party, and the person whose signature appears above as shipper, hereinafter called second party, the following conditions have been agreed to:

WHEREAS, first party transports live stock under certain rates, rules, and conditions as expressed in General Freight Department Circular G. F. D. No. 185-B, supplements thereto and releases thereof, and known as "Rules and Regulations Governing the Transportation of Live Stock," and the various classifications and tariffs applying between points under which the cattle named in this special agreement is to be performed, and in accordance with which the agreement is made and entered into, first party hereby undertaking to transport for second party certain live stock hereinafter described, at the rate of \$ per head, and more particularly described as follows, in so far as concerns car or cars in which consigned, and Way-bill numbers.

"If but one animal in shipment, show rate "PER HEAD"; if more than one, "PER LOT"; except that when car load shipments are made the rate "PER CAR" may be shown.

NOW, THEREFORE, second party, for and in consideration of the premises and the rates hereinafter named, and the cove to be performed hereunder, and other good and sufficient considerations (in case of carload shipment, carriage of man or men in charge at reduced rate, or free as rules may provide), hereby agrees to Load and Live Stock at Point of Shipment, Unload and Reload at Receiving Places, and Unload at Destination, and to Feed and Water at his Expense, and to Accompany and Attend Said Live Stock en route to Destination. Second party has examined the car or cars into which it is proposed to load such live stock, which is or are numbered and initialed as above, and accepts said car or cars as proper and suitable vehicles for transportation of the property for which this contract is issued, and hereby assumes all risk of loss or damage to or destruction of such stock, whether by fire, theft, pilferage, or other cause, and hereby releases and discharges first party, its agents, servants, employees, and all others, from and against all claims, demands, or damages, including reasonable attorney's fees, for loss of or damage to such stock, whether by fire, theft, pilferage, or other cause, or from any other person to car or steamer, the case may be, for feed or other purposes, or which may be sustained by reason of delay incident to ordinary transportation. It being agreed that in no event is first party or its servants to be liable for any loss of or damage to said live stock and prove to have been caused by the gross negligence of first party in the performance of or failure to perform some duty which, under the terms of this contract, is due from first party to second party as to said live stock.

Second party, in addition to the foregoing, hereby agrees to transport the live stock named in this special agreement, to be transported subject to the conditions of State, Territorial or Federal laws governing the transportation, unloading and feeding of live stock as route; and in case first party should, through its employees, furnish aid to assist in loading, unloading or en route, unloading or transferring said live stock, said employees of first party so assisting or performing services, shall be subject to the orders and direction of the employees of second party while so engaged, and not in any sense the agents of first party, and when live stock is in car or car at shipping point, consisting place or destination, it shall be at owner's risk of loss or damage, whether by fire, theft, pilferage, or other cause, and hereby releases and discharges first party, its agents, servants, employees, and all others, from and against all claims, demands, or damages, including reasonable attorney's fees, for loss of or damage to such stock, whether by fire, theft, pilferage, or other cause, or from any other person to car or steamer, the case may be, for feed or other purposes, or which may be sustained by reason of delay incident to ordinary transportation. It being agreed that in no event is first party or its servants to be liable for any loss of or damage to said live stock and prove to have been caused by the gross negligence of first party in the performance of or failure to perform some duty which, under the terms of this contract, is due from first party to second party as to said live stock.

Second party, in addition to the foregoing, hereby agrees to transport the live stock named in this special agreement, to be transported subject to the conditions of State, Territorial or Federal laws governing the transportation, unloading and feeding of live stock as route; and in case first party should, through its employees, furnish aid to assist in loading, unloading or en route, unloading or transferring said live stock, said employees of first party so assisting or performing services, shall be subject to the orders and direction of the employees of second party while so engaged, and not in any sense the agents of first party, and when live stock is in car or car at shipping point, consisting place or destination, it shall be at owner's risk of loss or damage, whether by fire, theft, pilferage, or other cause, and hereby releases and discharges first party, its agents, servants, employees, and all others, from and against all claims, demands, or damages, including reasonable attorney's fees, for loss of or damage to such stock, whether by fire, theft, pilferage, or other cause, or from any other person to car or steamer, the case may be, for feed or other purposes, or which may be sustained by reason of delay incident to ordinary transportation. It being agreed that in no event is first party or its servants to be liable for any loss of or damage to said live stock and prove to have been caused by the gross negligence of first party in the performance of or failure to perform some duty which, under the terms of this contract, is due from first party to second party as to said live stock.

First party hereby agrees to transport the live stock named in this special agreement, to be transported subject to the conditions of State, Territorial or Federal laws governing the transportation, unloading and feeding of live stock as route; and in case first party should, through its employees, furnish aid to assist in loading, unloading or en route, unloading or transferring said live stock, said employees of first party so assisting or performing services, shall be subject to the orders and direction of the employees of second party while so engaged, and not in any sense the agents of first party, and when live stock is in car or car at shipping point, consisting place or destination, it shall be at owner's risk of loss or damage, whether by fire, theft, pilferage, or other cause, and hereby releases and discharges first party, its agents, servants, employees, and all others, from and against all claims, demands, or damages, including reasonable attorney's fees, for loss of or damage to such stock, whether by fire, theft, pilferage, or other cause, or from any other person to car or steamer, the case may be, for feed or other purposes, or which may be sustained by reason of delay incident to ordinary transportation. It being agreed that in no event is first party or its servants to be liable for any loss of or damage to said live stock and prove to have been caused by the gross negligence of first party in the performance of or failure to perform some duty which, under the terms of this contract, is due from first party to second party as to said live stock.

Frank R Stewart

(EXHIBIT "A")

T. F. Delaney

Shipper.

Agent Southern Pacific Company.

ORIGINAL

SOUTHERN PACIFIC COMPANY
PACIFIC SYSTEM

LIVE STOCK SHIPPING ORDER CONTRACT AND BILL OF LADING

SPECIAL AGREEMENT

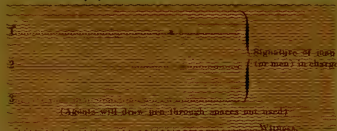
Executed by Station, Date 191.....
 of
 for of good for transportation of

Billing agent
stamp here.

From to
 when accompanying the stock herein described and not otherwise.
 This Contract must be presented to Agent of for renewal

RELEASE FOR MAN OR MEN IN CHARGE

In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract, without charge other than the sum stipulated therein, for the carriage of the live stock mentioned therein, the undersigned in charge do hereby, voluntarily, assume all risk of accident or damage to his (or their) person or property, and do hereby release and discharge the said carrier or carriers from every and all claims, liability and demand of every kind, nature and description, for or on account of any personal injury or damage of any kind sustained by the undersigned as in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise.



The man or men who may be entitled to return transportation free or at a reduced rate under carriers' rules in effect, published and posted as required by law, at time this contract was executed, will upon surrender of this contract to the carriers' agent, receive ticket or tickets for the return journey.

TIME OF LOADING

..... 191..... Hour..... m.
 Reated at
 Date arrived Hour..... m.
 Date dep't Hour..... m.

Name of Consignor

TIME OF ARRIVAL AT (Destination)
 191..... Hour..... m.

TIME OF UNLOADING

..... 191..... Hour..... m.
 Agent

VALUATION

Ordinary Live Stock will be received for transportation under the form of contract appearing upon the other side of this paper, subject to the following additional conditions: Shipments of Live Stock moving between points in Oregon will be received for transportation under the conditions of the "Low Value Live Stock Contract" and "Special Value Live Stock Contract." (Uniform Live Stock Contract prescribed by the Railroad Commission of Oregon.) Rates as shown in the tariffs of this Company apply only on Ordinary Live Stock, that is, the actual and declared value of which does not exceed:

Each Horse or Pony (Gelding, Mare or Stallion), Mule or Jack, \$100.00
 Each Colt (under 1 year) 50.00
 Each Ox, Bull or Steer 50.00
 Each Cow 30.00
 Each Calf 10.00
 Each Hog 10.00
 Each Sheep or Goat 3.00
 Range Cattle, each animal 30.00

Values in excess of the foregoing will be considered extraordinary, and such Extraordinary Live Stock will be received and forwarded by this Company only under the form of Contract above mentioned and subject to increased charges as compared with Ordinary Live Stock, as follows:

When actual and declared value exceeds that of Ordinary Live stock, as shown above, by:

100 per cent or less, increase the charge on each 10 per cent
 200 per cent or less, increase the charge on each 20 per cent
 300 per cent or less, increase the charge on each 30 per cent
 400 per cent or less, increase the charge on each 40 per cent
 500 per cent or less, increase the charge on each 50 per cent
 600 per cent or less, increase the charge on each 60 per cent
 700 per cent or less, increase the charge on each 70 per cent
 800 per cent or less, increase the charge on each 80 per cent
 900 per cent or less, increase the charge on each 90 per cent
 1000 per cent or less, increase the charge on each 100 per cent

Charge on animals of greater value in like proportion, but in no case will greater charge be made for other animals than for a horse of same valuation.

INSTRUCTIONS

Shippers or their agents must acquaint themselves with the rules and regulations governing the transportation of Live Stock as per G. F. D. Circular 188-E, supplements thereto and releases thereof, and known as "Rules and regulations Governing the Transportation of Live Stock," and the terms of said form of contract above mentioned.

ATTENDANTS

Attendants accompanying Live Stock to destination and returning under conditions and rules of this Contract and Bill of Lading, also Circular G. F. D. No. 188-E, supplements thereto and releases thereof, will be cared for as follows:

With 1 carload of Live Stock 1 man may accompany free, but not return free

With 2 to 5 carloads 1 man may accompany and return free

With 6 to 10 carloads 2 men may accompany and return free

With 11 or more carloads 3 men may accompany and return free

When more than one carload of stock is shipped account of one owner from different stations to one destination, on same train, man or men may accompany as per above, and will be entitled to return free as follows:

One man to the station where the second car was placed in train.

One additional man to the station where the sixth car was placed in train.

One additional man to the station where the eleventh car was placed in train.

Transportation will be furnished to persons in charge of sheep, Hogs, Goats and Calves in DOUBLE-DECK CARS ON BASIS OF TWO SINGLE-DECK CARS as equivalent to one double-deck.

RECEIPT

FOR THE

RETURN TRANSPORTATION

FURNISHED ORIGINAL OR SUBSTITUTED LIVE STOCK ATTENDANTS

Received Ticket, Form..... No..... Date.....

1..... To.....

Signature.....

Received Ticket, Form..... No..... Date.....

2..... To.....

Signature.....

Received Ticket, Form..... No..... Date.....

3..... To.....

Signature.....

SUBSTITUTED ATTENDANT

Received Ticket, Form..... No..... Date.....

To.....

Signature.....

SUBSTITUTED ATTENDANT

In case it becomes necessary for one of the persons in charge to leave train on route, substituting another in his place, such substitution must be made in presence of the Agent at station at which it occurs, who will cancel original signature and description and see that those of the substitute are properly affixed.

At..... Substitutes.....

Agent

ORIGINAL

SOUTHERN PACIFIC COMPANY
PACIFIC SYSTEMLIVE STOCK SHIPPING ORDER CONTRACT AND BILL OF LADING
SPECIAL AGREEMENT

INSTRUCTIONS

Shippers or their agents must acquaint themselves with the rules and regulations governing the transportation of Live Stock as per G. F. D. Circular 188-E, supplementa thereto and releases thereof, and known as "Rules and Regulations Governing the Transportation of Live Stock," and the terms of said form of contract above mentioned.

ATTENDANTS

It is expressly understood and agreed that if Southern Pacific Company shall accept the shipment of live stock covered by this contract, unaccompanied by person to take care of such shipment, Southern Pacific Company is hereby released from all liability as to damage to or loss of said live stock, when resulting in whole, or in part, from lack of care or attention of an attendant while in transit.

Attendants accompanying Live Stock to destination and returning under conditions and rules of this Contract and Bill of Lading, also Circular G. F. D. No. 188-E, supplementa thereto and releases thereof, will be cared for as follows:

With 1 carload of Live Stock 1 man may accompany free, but not return free.

With 2 to 5 carloads..... 1 man may accompany and return free
With 6 to 10 carloads..... 2 men may accompany and return free
With 11 or more carloads..... 3 men may accompany and return free
When more than one carload of stock is shipped account of one owner from different stations to one destination, on same train, man or men may accompany as per above, and will be entitled to return free as follows:

One man to the station where the second car was placed in train.
One additional man to the station where the sixth car was placed in train.

One additional man to the station where the eleventh car was placed in train.

Transportation will be furnished to persons in charge of Sheep, Hogs, Goats and Calves in DOUBLE-DECK CABS ON BASIS OF TWO SINGLE-DECK CABS as equivalent to one double-deck.

RETURN TRANSPORTATION

The man or men who may be entitled to return transportation free or at a reduced rate under the rules in effect, published and stock as required by law, at time this contract was executed, will upon surrender of this contract to the carrier's agent, receive ticket or tickets for the return journey.

Return transportation of attendants in charge of Live Stock will not be honored unless the contract for return passage is presented within seven (7) days after arrival of Live Stock at destination; but on shipments of Horses, return transportation for attendants in charge of same will be honored if contract is presented within fifteen (15) days after arrival of Horses at destination; except that upon shipments originating at or destined to points beyond this Company's eastern terminals, namely, Portland, Ore., Ogden, Utah, and Rio Grande, N. M., return passage will be limited as follows:

When destined beyond this Company's Eastern Terminals, namely Portland, Ore., Ogden, Utah, and Rio Grande, N. M., return transportation will be furnished within 90 days after Live Stock passes said terminals. When originating at points beyond this Company's Eastern Terminals and destined to points west of said terminals, return transportation will be furnished within 30 days after arrival of Live Stock at destination.

When destined to points on connecting lines south of Portland, Ore., west of Ogden, Utah, and Rio Grande, N. M., return transportation will be furnished (carriers) entitled to such transportation, if contract is presented within fifteen (15) days after Live Stock passes junction point with connecting line.

VALUATION

Ordinary Live Stock will be received for transportation under the form of contract appearing upon the other side of this paper, subject to the following additional conditions: Shipments of Live Stock moving between points in Oregon will be received for transportation under the conditions of the "Low Value Live Stock Contract" and "Special Value Live Stock Contract." (Uniform Live Stock Contract prescribed by the Railroad Commission of Oregon.) Rates as shown in the tariffs of this Company apply only on Ordinary Live Stock, that is, the actual and declared value of which does not exceed:

Each Horse (except Range Horses) or Pony (Gelding, Mare or Stallion), Mule or Jack.....	\$100.00
Each Colt (under 1 year).....	50.00
Each Ox, Bull or Steer.....	50.00
Each Cow.....	30.00
Each Calf.....	10.00
Each Hog.....	10.00
Each Sheep or Goat.....	3.00
Range Cattle, each animal.....	30.00
Range Horses, each animal.....	50.00

Values in excess of the foregoing will be considered extraordinary, and such Extraordinary Live Stock will be received and forwarded by this Company only under the form of Contract above mentioned and subject to increased charges as compared with Ordinary Live Stock, as follows:

When the actual and declared value exceeds that of Ordinary Live Stock, as shown above, the charges will be increased 10 per cent for each 100 per cent or fraction thereof increase in valuation.

Charge on animals of greater value in like proportion, but in no case will greater charge be made for other animals than for a horse of same valuation.

TIME OF LOADING

Loaded at 191..... Hour..... m.

Rested at Hour..... m.

Date arrived Hour..... m.

Date dep't'r Hour..... m.

Name of Consignee

TIME OF ARRIVAL AT..... (Destination)..... m.

TIME OF UNLOADING

..... 191..... Hour..... m.

Agent

Executed by.....

at..... Station, Date..... 191.....

for..... car..... of..... good for transportation of.....

From..... to.....
when re-empaying the stock herein described and not otherwise

This Contract must be presented to Agent at..... for renewal

RELEASE FOR MAN OR MEN IN CHARGE

In consideration of the carriage of the undersigned upon a freight train or the carrier or carriers named in the within contract, without charge, other than the amount stipulated therein, for the carriage of the live stock mentioned therein, the undersigned in charge do hereby, voluntarily, assume all risk of accident or damage to his (or their) person or property, and do hereby release and discharge the said carrier or carriers from every and all claim, liability and demand of every kind, nature and description, for or on account of any personal injury or damage, of any kind sustained by the undersigned or in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise.

SIGNATURE OF MAN OR MEN IN CHARGE		NO. MEN IN CHARGE	NO. CABS SHIPPED
One Man Only		1	①
		2	②
		3	③
		4	④
		5	⑤
Two Men Only		6	⑥
		7	⑦
		8	⑧
		9	⑨
		10	⑩
Three Men Only		11	⑪
		12	⑫

Agents will punch No. and description of men in charge, No. of cars shipped, witness signatures and cancel numbered spaces above.

Witness

RECEIPT FOR THE RETURN TRANSPORTATION
FURNISHED ORIGINAL OR SUBSTITUTED LIVE STOCK ATTENDANTS

Received Ticket, Form..... No..... Date.....	Stim	Young	O
1 From..... To.....	Medium	Middle Age	O
Signature.....	Stout	Elderly	O
	Short	Light Hair	O
	Medium	Dark Hair	O
	Tall	Gray Hair	O
Received Ticket, Form..... No..... Date.....	Stim	Young	O
2 From..... To.....	Medium	Middle Age	O
Signature.....	Stout	Elderly	O
	Short	Light Hair	O
	Medium	Dark Hair	O
	Tall	Gray Hair	O
Received Ticket, Form..... No..... Date.....	Stim	Young	O
3 From..... To.....	Medium	Middle Age	O
Signature.....	Stout	Elderly	O
	Short	Light Hair	O
	Medium	Dark Hair	O
	Tall	Gray Hair	O

SUBSTITUTED ATTENDANT

In case it becomes necessary for one of the persons in charge to leave train en route, substituting another in his place, such substitution must be made in presence of the Agent at station at which it occurs, who will cancel original signature and description and see that those of the substitute are properly affixed.

Substitutes		Stim <th>Young <th>O</th> </th>	Young <th>O</th>	O
At.....	Medium	Middle Age	O	
	Stout	Elderly	O	
	Short	Light Hair	O	
	Medium	Dark Hair	O	
	Tall	Gray Hair	O	

Received Ticket, Form..... No..... Date.....
From..... To.....

Signature

Billing agent
stamp here

ORIGINAL

SOUTHERN PACIFIC COMPANY
PACIFIC SYSTEMLIVE STOCK SHIPPING ORDER CONTRACT AND BILL OF LADING
SPECIAL AGREEMENT

INSTRUCTIONS

Shippers or their agents must acquaint themselves with the rules and regulations governing the transportation of Live Stock as per G. F. D. Circular 188-E, supplements thereto and releases thereof, and known as "Rules and Regulations Governing the Transportation of Live Stock," and the terms of said form of contract above mentioned.

ATTENDANTS

It is expressly understood and agreed that if Southern Pacific Company shall accept the shipment of live stock covered by this contract, unaccompanied by person to take care of such shipment, Southern Pacific Company is hereby released from all liability as to damage to or loss of said live stock, when resting in whole, or in part, from lack of care or attention of attendant while in transit.

Attendants accompanying Live Stock to destination and returning under conditions and rules of this Contract and Bill of Lading, also Circular G. F. D. No. 188-E, supplements thereto and releases thereof, will be cared for as follows:

With 1 carload of Live Stock 1 man may accompany free, but not return free.
With 2 to 5 carloads.....1 man may accompany and return free
With 6 to 10 carloads.....2 men may accompany and return free
With 11 or more carloads.....3 men may accompany and return free
When more than one carload of stock is shipped account of one owner from different stations to one destination, on same train, man or men may accompany as per above, and will be entitled to return free as follows:

One man to the station where the second car was placed in train.
One additional man to the station where the sixth car was placed in train.

One additional man to the station where the eleventh car was placed in train.

Transportation will be furnished to persons in charge of Sheep, Hogs, Goats and Calves in DOUBLE-DECK CARS OR LASHES OF TWO SINGLE-DECK CARS as equivalent to one double-deck.

RETURN TRANSPORTATION

The man or men who may be entitled to return transportation free or at a reduced rate under carriers' rules, in effect, published and put in force by law, at time this contract was executed, will upon surrender of this contract to the carriers' agent, receive ticket or tickets for the return journey.

Return transportation of attendants in charge of Live Stock will not be honored unless the contract for return passage is presented within seven (7) days after arrival of Live Stock at destination, but on shipments of Horses return transportation for attendants in charge of same will be honored if contract is presented within fifteen (15) days after arrival of Horses at destination; except that upon shipments destined to or destined to pass beyond the Company's eastern terminals, namely, Portland, Ore., Ogden, Utah, and Rio Grande, N. M., return passage will be limited as follows:

When destined beyond this Company's Eastern Terminals, namely Portland, Ore., Ogden, Utah, and Rio Grande, N. M., return transportation will be furnished within 90 days after Live Stock passes said terminals. When originating at points beyond this Company's Eastern Terminals and destined to points west of said terminals, return transportation will be furnished within 30 days after arrival of Live Stock at destination.

When destined to points on connecting lines south of Portland, Ore., west of Ogden, Utah, and Rio Grande, N. M., return transportation will be furnished. Carriers entitled to such transportation, say contract is presented within fifteen (15) days after Live Stock passes junction point with connecting line.

VALUATION

Ordinary Live Stock will be received for transportation under the form of contract appearing upon the other side of this paper, subject to the following additional conditions: Shipments of Live Stock moving between points in Oregon will be received for transportation under the conditions of the "Low Value Live Stock Contract" and "Special Value Live Stock Contract."—(Uniform Live Stock Contract prescribed by the Railroad Commission of Oregon.) Rates as shown in the tariffs of this Company apply only on Ordinary Live Stock, that is, the actual and declared value of which does not exceed:

Each Horse (except Range Horses) or Pony (Gelding, Mare or Stallion), Mule or Jack.....\$100.00
Each Colt (under 1 year).....50.00
Each Ox, Bull or Steer.....50.00
Each Cow.....30.00
Each Calf.....10.00
Each Hog.....10.00
Each Sheep or Goat.....3.00
Range Cattle, each animal.....30.00
Range Horses, each animal.....50.00

Values in excess of the foregoing will be considered extraordinary, and such Extraordinary Live Stock will be received and forwarded by this Company only under the form of Contract above mentioned and subject to increased charges as compared with Ordinary Live Stock, as follows:

When the actual and declared value exceeds that of Ordinary Live Stock, as shown above, the charges will be increased 10 per cent for each 100 per cent or fraction thereof increase in valuation.

Charge on animals of greater value in like proportion, but in no case will greater charge be made for other animals than for a horse of same valuation.

TIME OF LOADING

.....191..... Hour.....m.

Loaded at

Date arrived Hour.....m.

Date dep't Hour.....m.

Name of Consignor

.....

(Destination)

.....191..... Hour.....m.

.....

TIME OF UNLOADING

.....191..... Hour.....m.

.....

..... Agent

Executed by

of Station, Date191.....

for car..... of good for transportation of

Billing agent
stamp here.

From to
when accompanying the stock herein described and not otherwise.

This Contract must be presented to Agent at for renewal

RELEASE FOR MAN OR MEN IN CHARGE

1. Consideration of the carriage of the undersigned upon a freight train or as carrier of carriers named in the within contract, without charge other than the sum stipulated therein, for the carriage of the live stock mentioned therein, the undersigned in charge do hereby, voluntarily, assume all risk of accident or damage to his (or their) person or property, and do hereby release and discharge the said carrier or carriers from every and all claim, liability and demand of every kind, nature and description, for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise.

SIGNATURE OF MAN OR MEN IN CHARGE		NO. MEN IN CHARGE	NO. CARS SHIPPED
One Man Only		1	①
			②
			③
			④
			⑤
Two Men Only		2	⑥
			⑦
			⑧
			⑨
			⑩
Three Men Only		3	⑪
			Or More

Agents will punch No. and description of men in charge, No. of cars shipped, witness signatures and cancel unused spaces above.

RECEIPT FOR THE RETURN TRANSPORTATION
FURNISHED ORIGINAL OR SUBSTITUTED LIVE STOCK ATTENDANTS

Received Ticket, Form..... No..... Date.....	Slit..... Young..... Q	Medium..... Middle Age..... Q
1 From..... To.....	Slit..... Elderly..... Q	Medium..... Light Hair..... Q
Signature.....	Slit..... Dark Hair..... Q	Medium..... Gray Hair..... Q
Received Ticket, Form..... No..... Date.....	Slit..... Young..... Q	Medium..... Middle Age..... Q
2 From..... To.....	Slit..... Elderly..... Q	Medium..... Light Hair..... Q
Signature.....	Slit..... Dark Hair..... Q	Medium..... Gray Hair..... Q
Received Ticket, Form..... No..... Date.....	Slit..... Young..... Q	Medium..... Middle Age..... Q
3 From..... To.....	Slit..... Elderly..... Q	Medium..... Light Hair..... Q
Signature.....	Slit..... Dark Hair..... Q	Medium..... Gray Hair..... Q

SUBSTITUTED ATTENDANT

In case it becomes necessary for one of the persons in charge to leave train en route, substituting another in his place, such substitution must be made in presence of the Agent at station at which it occurs, who will cancel original signature and description and see that those of the substitute are properly affixed.

Substitutes		Agent	
Slit..... Young..... Q	Medium..... Middle Age..... Q	Slit..... Young..... Q	Medium..... Middle Age..... Q
Slit..... Elderly..... Q	Medium..... Light Hair..... Q	Slit..... Elderly..... Q	Medium..... Light Hair..... Q
Slit..... Dark Hair..... Q	Medium..... Gray Hair..... Q	Slit..... Dark Hair..... Q	Medium..... Gray Hair..... Q

Received Ticket, Form..... No..... Date.....

From..... To.....

Signature.....

SOUTHERN PACIFIC COMPANY
PACIFIC SYSTEM

LIVE STOCK SHIPPING ORDER CONTRACT AND BILL OF LADING
SPECIAL AGREEMENT

INSTRUCTIONS

Shippers or their agents must acquaint themselves with the rules and regulations governing the transportation of Live Stock as per G. F. D. Circular 188-E, supplements thereto and reissues thereof, and known as "Rules and Regulations Governing the Transportation of Live Stock," and the terms of said form of contract above mentioned.

ATTENDANTS

It is expressly understood and agreed that if Southern Pacific Company shall accept the shipment of live stock covered by this contract, unaccompanied by person to take care of such shipment, Southern Pacific Company is hereby released from all liability as to damage to or loss of said live stock, when resulting in whole, or in part, from lack of care or attention of an attendant while in transit.

Attendants accompanying Live Stock to destination and returning under conditions and rules of this Contract and Bill of Lading, also Circular G. F. D. No. 188-E, supplements thereto and reissues thereof, will be cared for as follows:

With 1 carload of Live Stock 1 man may accompany free, but not return free.
With 2 to 5 carloads.....1 man may accompany and return free
With 6 to 10 carloads.....2 men may accompany and return free
With 11 or more carloads.....3 men may accompany and return free
When more than one carload of stock is shipped account of one owner from different stations to one destination, on same train, man or men may accompany as per above, and will be entitled to return free as follows:

One man to the station where the second car was placed in train.
One additional man to the station where the sixth car was placed in train.
One additional man to the station where the eleventh car was placed in train.
Transportation will be furnished to persons in charge of Sheep, Hogs, Goats and Calves in DOUBLE-DECK CARS ON BASIS OF TWO SINGLE-DECK CARS as equivalent to one double-deck.

RETURN TRANSPORTATION

"The man or men who may be entitled to return transportation free or at a reduced rate under carriers' rules in effect, published and posted as required by law, at time this contract was executed, will upon surrender of this contract to the carriers' agent, receive ticket or tickets for the return journey.
Return transportation of attendants in charge of Live Stock will not be ordered unless the contract for return passage is presented within seven (7) days after arrival of Live Stock at destination; but on shipments of Horses, return transportation for attendants in charge of same will be honored if contract is presented within fifteen (15) days after arrival of Horses at destination; except that upon shipments originating at or destined to points beyond this Company's eastern terminals, namely, Portland, Ore., Ogden, Utah, and Rio Grande, N. M., When destined beyond this Company's Eastern Terminals, namely Portland, Ore., Ogden, Utah, and Rio Grande, N. M., return transportation will be furnished within 90 days after Live Stock passes said terminals. When originating at points beyond this Company's Eastern Terminals and destined to points west of said terminals, return transportation will be furnished within 30 days after arrival of Live Stock at destination.
When destined to points on connecting lines south of Portland, Ore., west of (Ogden, Utah, and Rio Grande, N. M., return transportation will be furnished (15) days after Live Stock passes junction point with connecting line.

Answer.

And not waiving its foregoing pleas, and for answer to plaintiff's complaint on file herein, defendant says:

I.

Admits that plaintiff is a resident of Maricopa County, Arizona, and alleges that the said plaintiff is now and was at the time of the commencement of this action and ever since has been a resident and citizen of the State of Arizona.

Admits that defendant is a corporation, and alleges that defendant is now, and was at the time of the commencement of this action and ever since has been a corporation duly organized, created by and existing under and by virtue of the laws of the State of Kentucky. That it is now and was at the time of the commencement of said action and ever since has been a nonresident of the State of Arizona, and is not now and was not at the time of the commencement of this action and never has been a citizen of the said State of Arizona.

Admits that it is now and was during the time mentioned in said complaint a common carrier engaged in the transportation of freight for hire.

II.

That heretofore, on or about July 1, 1913, this defendant, in its capacity as such common carrier, received from plaintiff at the town of San Luis Obispo, in the State of California, those certain 152 head of cows, more or less, being the same animals as men-

tioned and described in plaintiff's complaint herein, for transportation over its said line of railroad and its connecting carrier, to wit, the Arizona Eastern Railroad Company, from the said town of San Luis Obispo to the city of Phoenix, in the State of Arizona. [30]

That in the course of such transportation and on July 2, 1913, at 2:35 P. M., the said cattle were by this defendant unloaded for feed and rest at the city of Los Angeles, State of California, a station on defendant's line of railroad, and thereafter, and without any unusual delay were again loaded into cars of this defendant, on July 3, 1913, at about 3:40 P. M., and were forwarded and transported by this defendant in its said cars, on its said line of railroad, from the said city of Los Angeles, without any unusual delay and without any negligence whatever on the part of defendant, to the town of Yuma, in the State of Arizona, a station on defendant's said line of railroad. That the cattle arrived at the said station of Yuma, in the State of Arizona, at about the hour of 10:35 A. M. of July 4, 1913.

That at the time said cattle so arrived at the said station of Yuma, in the State of Arizona, they had been confined in said cars for about twenty hours without feed or rest, and that it was absolutely necessary for defendant to unload said cattle at the said town of Yuma for feed and rest, in order to comply with the provisions of that certain Act of Congress entitled "An Act to Prevent Cruelty to Animals in Transit by Railroad or Other Means of Transportation From One State, Territory or the District of

Columbia into or Through Another State, Territory or the District of Columbia," etc., approved June 29, 1906, 34 Stat. L., p. 607; 1909 Supp. Fed. Stats. Anntd., p. 43.

That the defendant did so unload said cattle at the said station of Yuma for feed and rest for the purpose of complying with the provisions of said Act of Congress; and that without violating said Act of Congress it was impossible for defendant to have transported said cattle any farther than said station of Yuma, before unloading them for feed and rest, in this, to wit, that if said cattle had not been so unloaded, but had [31] been transported at destination, without unloading for feed and rest at Yuma, it would have resulted in the cattle having been confined in the cars without feed or rest for a period of time in excess of twenty-eight consecutive hours.

That the plaintiff did not, nor did anyone for him, upon the arrival of said cattle at the said town of Yuma, Arizona, or at any other time or place, file with or tender to this defendant or to any of its agents any written request, separate and apart from any printed bill of lading or other railroad form, extending the time which said animals could be confined from twenty-eight to thirty-six hours, as provided by said statute.

That defendant had at said time properly equipped stock-pens and stock corrals at a certain station on its said line or railroad known as Gila, Arizona, a distance of 123 miles easterly from the said town of Yuma and in the direction in which said cattle were being transported, but that neither this defendant

nor its said connecting carrier, the said Arizona Eastern Railroad Company, had at said time any stockpens or corrals at the station of Maricopa, Arizona, the point at which said cattle were to be delivered by this defendant to its said connecting carrier, said Arizona Eastern Railroad Company, for transportation by said Arizona Eastern Railroad Company to destination, the said city of Phoenix, into which said cattle could have been unloaded for feed and rest.

That upon the arrival of said cattle at the said town of Yuma, Arizona, this defendant was willing and anxious and offered to transport said cattle for plaintiff on to the said station of Gila, upon its said line, there to be unloaded for feed and rest, but that plaintiff absolutely refused to permit defendant to do so.

That thereupon and immediately upon the arrival of said [32] cattle at said station of Yuma, Arizona, on July 4, 1913, at about 10:35 A. M., this defendant notified its said connecting carrier, to wit, said Arizona Eastern Railroad Company, by telegraph, that said cattle were then at said town of Yuma, en route to Phoenix, Arizona, and requested information from the said Arizona Eastern Railroad Company if it could handle said cattle if this defendant should transport said cattle on to said station of Maricopa from the said town of Yuma without feed or rest, and the said Arizona Eastern Railroad Company notified, advised and informed this defendant that it could not so handle said cattle from the said station of Maricopa, Arizona, to the place of destination, to wit, Phoenix, Arizona, and that it,

the said Arizona Eastern Railroad Company, did not and would not have any facilities at the said station of Maricopa, upon the arrival of said freight-train so containing said cattle, if the said cattle should be brought to the said station of Maricopa without unloading for feed and rest, to enable it, the said Arizona Eastern Railroad Company to transport said cattle from the said station of Maricopa to destination at Phoenix, Arizona, within thirty-six hours from the time said cattle were so loaded at the said city of Los Angeles, State of California, as hereinbefore set forth; and that by reason of the foregoing facts it was necessary for this defendant, in order to comply with the said Act of Congress known as the twenty-eight hour law, to unload said cattle at the said town of Yuma for feed and rest, even though plaintiff had filed with this defendant a written request, as provided by said Act, extending the time which said animals could be confined from twenty-eight to thirty-six hours, which this defendant specifically denies.

That at the time of the arrival of said cattle at the said town of Yuma, on account of the extreme heat at that place [33] and of the country through which they had been transported, they were in no condition to be kept in the cars any longer and were in no condition to withstand any further shipment without feed and rest.

That defendant thereafter, and on the same day, to wit, July 4, 1913, reloaded said cattle into its said cars at the said station of Yuma and forwarded the same to destination over its said line of railroad and

the line of its connecting carrier, to wit, the Arizona Eastern Railroad, to the city of Phoenix, State of Arizona, without any unusual delay and without any negligence whatsoever on its part.

That by reason thereof plaintiff is not entitled to recover any damages from this defendant for the matters and things set forth in his said complaint.

III.

Defendant alleges that heretofore, on or about July 1, this defendant, as a common carrier, received from plaintiff, at the town of San Luis Obispo, in the State of California, those certain 152 head of cows, as mentioned and described in plaintiff's complaint, for transportation in five cars to the city of Phoenix, in the State of Arizona, over the line of railroad operated by this defendant and its connecting carriers, under three certain contracts in writing, then and there made and entered into by and between plaintiff and his duly authorized agents, to wit, one Frank E. Whitten and one James Ford, and this defendant, which said contracts were identical in form and the contents of each were the same with the exception that one of said contracts was executed by the said Frank R. Stewart in person, and covered sixty head of said cattle contained in two of said cars; one of said contracts was executed by the said Frank E. Whitten, the duly authorized agent of and [34] *and* for and on behalf of said Frank R. Stewart, the owner of said cattle, and covered sixty-two head of said cattle; contained in two of said cars; and the other of said contracts was executed by the said James Ford, the duly authorized

agent of and for and on behalf of the said Frank R. Stewart, the owner of said cattle, and covered thirty head of said cattle contained in one of said cars, true and correct copies of which said contracts are annexed to defendant's second plea in bar herein, and being the same contracts referred to in said plea in bar, and are now here made a part of this answer as though the same were again set forth *in haec verba*.

That in transporting said shipment of cattle this defendant and its connecting carrier fully performed each and every act upon their part required to be performed by the terms and provisions of said contracts and by the published freight tariffs governing such shipments, and if any loss or injury occurred to said livestock, as alleged in plaintiff's complaint, all of which this defendant expressly denies, this defendant is exempt from liability therefor under the terms and stipulations set forth in said agreements.

That under and by virtue of the terms of said contracts and each of them plaintiff herein agreed and bound himself that in case any loss or damage should be sustained for which this defendant might be liable that then this plaintiff should make demand or claim therefor in writing to the freight claim agent of this defendant within ten days after the unloading of said cattle at destination, to wit, at the city of Phoenix, State of Arizona, and that in the event of the failure of plaintiff so to do all claims for loss or damage in the premises were thereby expressly waived, released and made void.

That said cattle were unloaded by plaintiff and

received [35] and taken and driven away by him on the 5th day of July, 1913, at destination, to wit, at the city of Phoenix, Arizona, and that plaintiff did not, nor did anyone for him or on his behalf, within ten days after so unloading said cattle at said destination, make any demand or claim in writing to the freight claim agent of this defendant or to this defendant or to any agent of this defendant company for any loss or damage to said shipment of cattle.

That it was entirely possible for plaintiff to have given such notice, and that this defendant at all the times mentioned in plaintiff's complaint had an agent at the said city of Phoenix, State of Arizona, at the place where said cattle were unloaded, as set forth in plaintiff's complaint, and that defendant had at all of said times many agents in the State of Arizona, and in the State of California, to whom such notice could have been given.

That by reason of the failure of plaintiff or anyone for him or on his behalf to make any claim in writing within ten days after the unloading of said cattle to the freight claim agent of this defendant or to any agent of this defendant, as aforesaid, for any loss or damage to any of said cattle that plaintiff thereby expressly waived and released any and all claims whatsoever on account of any loss or damage to said cattle, if said cattle were damaged as alleged, against this defendant.

That by reason of the failure of plaintiff to give such notice in manner and form as required by said agreement that he is not entitled to recover on his

said alleged claim and should not be permitted to maintain this action.

IV.

That heretofore, on or about July 1, 1913, this defendant, as a common carrier, received from plaintiff at the town of [36] San Luis Obispo, in the State of California, those certain 152 head of cows as mentioned and described in plaintiff's complaint, for transportation, in five cars, to the city of Phoenix, in the State of Arizona, over the lines of railroad operated by this defendant and its connecting carrier, to wit, the Arizona Eastern Railroad Company, under those certain contracts in writing above referred to.

That said contracts and each of them were fairly made and entered into between plaintiff and his duly authorized agents and this defendant and that by reason of the execution thereof and in consideration of the same plaintiff obtained a lower published freight tariff rate for said shipment that would have been otherwise assessed thereon and therefor, and that the difference between said freight rate so assessed on said shipment by reason of the execution of said contracts and the higher published tariff rate which would have been applicable thereto had said contracts not been entered into is reasonable and in proportion to the liability of the defendant under the stipulation contained in said contracts.

That in transporting said shipment of cattle this defendant and its said connecting carrier fully performed each and every act upon their part required to be performed by the terms and provisions of said

contracts and the published tariffs governing such shipments.

That under and by virtue of the terms of said contracts so made and entered into by and between plaintiff and his duly authorized agents and this defendant as hereinbefore set forth the plaintiff then and there stipulated that the agreed valuation of said livestock, as stated in said contracts, was the sum of thirty dollars per head.

That said agreed valuation was made and placed upon said [37] cattle by plaintiff for and in consideration of a cheaper and lower freight rate obtained on said shipment and that plaintiff then and there agreed that in any event there should be no recovery for loss or damage on said livestock in excess of said declared valuation of thirty dollars per head.

Wherefore, and by reason thereof, plaintiff is not entitled to recover in this action, in any event, anything over and above said sum of thirty dollars per head for any of said animals so alleged to have been lost or damaged.

V.

Defendant specifically denies that said animals were robust, healthy and in every way in first-class physical condition at the time said animals were delivered to it at San Luis Obispo, California, for transportation to Phoenix, Arizona; but alleges that at the time said animals were so delivered to this defendant at said place they were in a poor, weak and starved condition, due to the condition of the feed

and ranges in the country and vicinity from which the said animals were obtained by plaintiff, to wit, the country and vicinity in and around San Luis Obispo, State of California.

Defendant denies on information and belief that said animals were dairy cows, as alleged by plaintiff, but that it is informed and believes and upon such information and belief alleges that plaintiff purchased said cows at said city of San Luis Obispo, State of California, and in the vicinity thereof because same could be purchased very cheaply on account of there being no feed in said country and on account of the cows being in a poor, weak and starved condition.

Defendant further alleges that the climatic conditions of the country and vicinity in and around San Luis Obispo, State of California, where the said animals mentioned and described [38] by plaintiff were bred and raised, and from where plaintiff obtained said animals, are entirely different from the climatic conditions in and around Yuma, Arizona, and Phoenix, Arizona, and especially during the summer months, in this, to wit, that the climate of the country in and around San Luis Obispo, Calif., and the place where said animals were bred and raised, and from where the plaintiff obtained the said animals is and was at the time plaintiff so obtained the said animals cool and moist as compared with the climatic conditions which existed at that time, in the month of July, in and around Yuma and Phoenix, Arizona, all of which was well known to plaintiff at the time he so shipped said animals; and

if any loss or injury resulted to any of said animals, which this defendant expressly denies, that such loss or injury was wholly caused by plaintiff bringing said animals, in their then condition, as above set forth, from a cool moist climate, such as that time existed in and around San Luis Obispo, California, into an extremely hot and dry climate in Arizona.

VI.

That defendant is informed and believes and upon such information and belief alleges that immediately upon the arrival of said cattle at destination, to wit, at the city of Phoenix, Arizona, on July 5, 1913, over the line of railroad of defendant's connecting carrier, to wit, the Arizona Eastern Railroad, plaintiff took and drove all of said animals away without paying any of the freight charges due and owing to this defendant and its said connecting carrier for the transportation of said cattle, and without paying for the feed so provided by this defendant to said cattle in the course of said shipment, and that plaintiff has not prior to the commencement of this action, or at all, paid such freight or feeding charges, and [39] defendant is advised and informed and therefore alleges that by reason thereof plaintiff is not entitled to recover from this defendant for the matters and things set forth in his complaint herein.

VII.

Defendant denies generally each and every allegation in said complaint contained not herein expressly admitted.

WHEREFORE, defendant prays that plaintiff take nothing by his action herein, and that it have judgment for its costs.

FRANCIS M. HARTMAN,
Tucson, Arizona.

J. C. FOREST,
Phoenix, Arizona,
Attorneys for Defendant.

[Endorsements]: No. 142 (Phx.) In the United States District Court for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Defendant's Second Amended Pleas and Answer. Service of Copy Admitted this 11th Day of October, 1915. Hayes & Laney, Attys. for Plff. Filed Oct. 11, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [40]

*In the United States District Court for the District
of Arizona.*

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

**Reply to Defendant's Second Amended Pleas and
Answer.**

REPLY TO DEFENDANT'S FIRST PLEA IN
BAR AS SET FORTH IN HIS FIRST
AMENDED ANSWER HEREIN.

Comes now the plaintiff, by Messrs. Hayes &

Laney, his attorneys, and replying to defendant's first plea in bar, demurs thereto, and for grounds of his demurrers says:

I.

That defendant has not in and by its first plea in bar, set forth facts sufficient to bar plaintiff's right of recovery upon his complaint herein.

II.

That the matters and things set forth in defendant's first plea in bar, are purely defensive matter, and fully set forth and pleaded as defensive matter in defendant's second amended answer herein, and are insufficient in themselves if taken as confessed, to constitute a complete defense to plaintiff's complaint herein.

WHEREFORE, plaintiff prays that defendant take nothing by reason of its first plea of bar herein, and that its said plea be dismissed.

HAYES & LANEY,

Attorneys for Plaintiff. [41]

Should the foregoing demurrers be overruled then plaintiff for reply to defendant's first plea in bar, admits the allegations contained in the first and second paragraphs thereof, and further replying to said plea, plaintiff denies that said cattle were loaded into the cars of the defendant at Los Angeles, California, on the 3d day of July, 1913, at about the hour of 3:40 P. M. and in that behalf alleges that said cattle were so loaded at approximately the hour of 4:40 P. M., and moved out of said station of Los Angeles, at about the hour of 5:30 P. M., and further replying, plaintiff denies that said cattle arrived at

the station of Yuma, Arizona, at the hour of 10:35 A. M. of the 4th day of July, 1913, and in that behalf alleges that said shipment arrived at the station of Yuma, at approximately 9:00 A. M. of said 4th day of July, 1914.

Plaintiff denies that at the time of the arrival of said shipment at Yuma, Arizona, they had been confined in said cars for a period of twenty hours without feed or rest, and in that behalf alleges that said shipment was so confined for the period of approximately sixteen hours and twenty minutes and no more. Plaintiff denies that it was absolutely necessary, or at all necessary, for defendant to unload said cattle at the town of Yuma, for feed and rest in order to comply with the provisions of the Act of Congress referred to in defendant's first plea in bar. Plaintiff admits that to have forwarded said cattle to Phoenix, Arizona, without unloading for feed and rest, would have caused them to be confined in the defendant's cars for a period slightly in excess of twenty-eight hours, viz.: for a period of approximately twenty-nine hours.

Further replying, plaintiff denies that he did not upon the arrival of said cattle at the town of Yuma, file with or tender to the defendant or its agent, a request in writing separate and apart from any printed bill of lading or other [42] railroad form, extending the time which said animals could be confined, from twenty-eight to thirty-six hours, as provided by said Statute.

Further replying, plaintiff admits that the defendant had at the time of said shipment, properly

equipped stock-pens and corrals at the station of Gila, Arizona, a distance of one hundred and twenty-three miles easterly from said town of Yuma, and alleges that said shipment could have been forwarded by the defendant, without in anywise violating the provisions of the so-called twenty-eight hour law. Further replying, plaintiff denies that the defendant expressed a willingness or anxiety to, or in anywise offered to transport said cattle to the said station of Gila; and further denies that he, the plaintiff, refused to permit the forwarding of said shipment to said station of Gila; and in that behalf alleges that the agent of the defendant neither offered to transport said cattle or even mentioned the name of said station, and alleges that the said agent of the defendant made no proposition conditionally or otherwise, to move said shipment for any distance whatsoever, beyond the station of Yuma, before unloading the same.

Further replying, the plaintiff is reliably informed and believes, and upon such information denies that the defendant notified its connecting carrier, the Arizona Eastern Railroad Company, by telegraph or otherwise, that said cattle were at the town of Yuma en route to Phoenix; and further denies that the defendant requested information from said Arizona Eastern, as to whether it could handle said cattle if the defendant should transport them to the station of Maricopa without feed and rest, and denies that the Arizona Eastern Railroad Company notified, advised or informed the defendant that it

could not so handle said cattle from the said station [43] of Maricopa, to place of destination at Phoenix, Arizona, within thirty-six hours from the time said cattle were loaded at the city of Los Angeles, California, but in that behalf alleges that said Arizona Eastern Company had at the time said shipment arrived at Yuma, completed arrangements with this plaintiff for meeting said shipment at Maricopa, and did actually proceed to Maricopa with its said train, which said train was in fact waiting at Maricopa to receive said shipment at the time the freight train on which said shipment arrived at Yuma, passed through the station of Maricopa.

Further replying, plaintiff denies that at the time of the arrival of said cattle at the town of Yuma, by reason of the heat at that place and the country through which said cattle had been transported or otherwise, they were in no condition to be kept longer in defendant's cars, and denies that they were not, upon their arrival at said town of Yuma, in proper condition to withstand further shipment without feed and rest, but in that behalf alleges that said shipment arrived at Yuma in good condition and that had said cars been moved forward without unloading at said station, the injuries to said cattle and the loss to the plaintiff as set forth in his said complaint herein, would not have been sustained.

For a further reply to said first plea in bar, plaintiff alleges that at the time of loading said shipment of cattle at San Luis Obispo, California, for shipment to Phoenix, as set forth in his complaint

herein, said cattle were healthful, in good flesh, and in every respect in first-class shipping condition; that because of the length of time said cattle would be confined in the defendant's cars in their transportation from Los Angeles to the city of Phoenix, in accordance with the arrangements set forth in plaintiff's [44] complaint, and hereinafter more fully set forth, plaintiff caused said cattle to be unloaded at the city of Los Angeles, in the defendant's stockyards for feed and rest, for a period of approximately twenty-six hours, and at the time of reloading said cattle at Los Angeles, they had been well fed, watered and rested, and were in first-class condition to withstand shipment from said station to the city of Phoenix, Arizona.

That prior to moving said cattle from Los Angeles, the plaintiff had arranged with the Arizona Eastern Railroad, the defendant's delivering carrier, in said shipment, to have said cattle immediately upon their arrival at Maricopa, Arizona, attached to a fast passenger train of said Arizona Eastern railroad, and immediately transported to their destination at Phoenix, Arizona; that had said cattle been handled in accordance with the plaintiff's arrangements made as aforesaid, and in keeping with plaintiff's instructions to the defendant's agents at the town of Yuma, as set forth in plaintiff's complaint, and hereinafter more fully referred to, said cattle would have arrived at Phoenix, Arizona, at the hour of 9:30 in the evening of said July 4th, 1913, after having been confined in defendant's

cars for a period of twenty-eight hours and fifty minutes. That the freight train to which plaintiff's shipment was attached, did, after consuming approximately one and a half hours at the station of Yuma, for the unloading of plaintiff's cattle, arrive at the station of Maricopa at about 7:15 P. M. of said 4th day of July, 1913.

For a further reply, plaintiff alleges that had said shipment been moved from the station of Yuma without unloading, and should unavoidable delays have necessitated the unloading of said cattle prior to arrival at Phoenix, Arizona, in order to comply with the Act referred to by defendant, the defendant had other feeding stations between said town of Yuma and the [45] city of Phoenix, Arizona, at which said cattle could have been unloaded.

For a further reply, plaintiff alleges that upon the arrival of his said shipment at the station of Yuma, the weather at said station was extremely hot, the stock-pens maintained by the defendant company at said station, very dusty, and entirely without shade of any character, and in no wise properly and suitably equipped for receiving said shipment for feed and rest, under the climatic conditions then existing at said station of Yuma; that the defendant owed to this plaintiff, the duty of maintaining suitably equipped pens in which to receive his said stock for feed, water and rest; that at the time of the arrival of said cattle at Yuma, the plaintiff informed and advised the defendant that its said feeding and rest pens were not suitably equipped to receive his

said shipment under the weather conditions then prevailing at said station, and that said cattle could not be unloaded and received in said pens in a proper and humane manner; and further advised the defendant that said cattle had been well fed, watered and rested at Los Angeles; that he had made arrangements with the Arizona Eastern Railroad Company to receive said shipment promptly on arrival at Maricopa, Arizona, and that said cattle could be shipped to Phoenix without injuring said shipment, and upon the refusal of the defendant to comply with plaintiff's request, that said shipment be moved forward in accordance with the arrangement he had made for the handling of said shipment, the plaintiff then and there delivered to the defendant's agents at said station of Yuma, the telegraph arrangements he had theretofore made with the Arizona Eastern Railroad Company, for the immediate forwarding of said cattle to Phoenix, Arizona, upon their arrival at Maricopa, Arizona, and [46] further tendered a request in writing, separate and apart from his shipping contract, extending the time to the defendant for unloading and resting said cattle, to the period of thirty-six hours from the date of loading said cattle in Los Angeles and further agreed and tendered said agent in writing, a full release from all liability for damage to the said plaintiff, resulting from the forwarding of said cattle, which said tender was refused by the defendant, through its said agents.

WHEREFORE, plaintiff prays that defendant

take nothing by reason of its first plea in bar herein.

HAYES & LANEY,
Attorneys for Plaintiff.

REPLY TO DEFENDANT'S SECOND PLEA IN
BAR, AS SET FORTH IN DEFENDANT'S
SECOND AMENDED ANSWER HEREIN.

Replying to defendant's second plea in bar herein, plaintiff demurs thereto, and for grounds of his demurrers, says:

I.

That defendant has not in and by its second plea in bar, set forth facts sufficient to bar plaintiff's right of recovery upon his complaint herein.

II.

That the matters and things set forth in defendant's second plea in bar, are purely defensive matter, and fully set forth and pleaded as defensive matter in defendant's second amended answer herein, and are insufficient in themselves if taken as confessed, to constitute a complete defense to plaintiff's complaint herein. [47]

WHEREFORE, plaintiff prays that defendant take nothing by reason of its second plea of bar herein, and that its said plea be dismissed.

HAYES & LANEY,
Attorneys for Plaintiff.

Should the foregoing demurrers be overruled, then for his reply to defendant's second plea in bar, plaintiff admits the transportation of his said cattle in five cars, from San Luis Obispo, California, to Phoenix, Arizona, over the line of railroad operated by the

defendant and its connecting carrier, the Arizona Eastern, under three contracts in writing made and entered into between the plaintiff and his duly authorized agents, Frank Whitton and James Ford, and the defendant, but has no information upon which to base a belief that the copies attached to defendant's second plea in bar, are true copies of the original contracts entered into between the plaintiff and his agents and the defendant, and therefore denies that said copies are correct copies of the original shipping contracts.

Further replying, plaintiff denies that in the handling of said shipment, the defendant and its connecting carrier fully performed each and every act required to be performed by them under the provisions of their said shipping contracts and the published freight tariffs governing said shipments, and further denies that the defendant is exempt from liability for the losses and injuries to said livestock, as set forth in plaintiff's complaint, under the terms of said shipping contracts or otherwise, or at all.

Further replying, plaintiff admits that said shipping contracts entered into between plaintiff and his agents and the defendant, contain a proviso that in case any loss or damage should be sustained for which defendant might be liable, [48] that plaintiff would make demand or claim therefor in writing, to the freight claim agent of the defendant, within ten days after the unloading of said cattle at Phoenix, Arizona, and that said contracts contain the further proviso that in the event of the failure of the plaintiff so to do, all claims for losses or dam-

ages in the premises, were waived, released and made void, but this plaintiff denies that he assented to the terms of said provisos or either of them;

Plaintiff admits that said cattle were unloaded and received by him on the 5th day of July, 1913, at the city of Phoenix, and admits that he did not nor did any person else to plaintiff's knowledge or on his behalf, make demands or claim in writing within said ten day period, to the freight claim agent of the defendant, or to the defendant or to any agent of the defendant, for the loss or damage sustained by him in said shipment; and

Further replying, plaintiff denies that it was entirely possible or at all possible for him to have given such notice in writing or at all, to the defendant or to its agents within said ten day period, after the unloading of said cattle, for the reasons hereinafter more fully set forth; and further replying, plaintiff denies that by reason of his failure or the failure of any person for him or on his behalf, to make such claim in writing within ten days after the unloading of said cattle, he waived or released all or any portion of his said claims against the defendant on account of the loss or damage to his said shipment, as set forth in his said complaint.

Further replying, plaintiff alleges that on the 4th day of July, 1913, and at all times subsequent to the arrival of said cattle at the station of Yuma, Arizona, the defendant had full knowledge and notice of the injuries and damage to [49] plaintiff's cattle as set forth in his said complaint; that said cattle were unloaded by the defendant into its stock-pens

at the station of Yuma, between the hours of nine and ten o'clock A. M. on the 4th day of July, 1913, and between said date and the hour of 7:30 P. M. of said day, and prior to the reloading of said cattle into the defendant's cars, five of said cows died; that said cattle remained in the defendant's stock-pens at Yuma from about the hour of 10:00 A. M. of said 4th day of July, 1913, to 7:30 P. M. of said day, without any shelter or protection whatsoever from the intense heat of the sun, and were nursed and cared for during said entire period by the defendant's agents, assisted by one James Ford; that upon loading said cattle it became necessary to provide, and the defendant did provide, an additional car in which to *hip* thirteen of the sick and crippled cattle of the plaintiff to their destination at Phoenix; that at various points between the said station of Yuma and the city of Phoenix, the train officials in charge of said shipment, received telegraphic inquiries from other officials of the defendant, inquiring as to the condition and welfare of said shipment; that upon the arrival of said shipment at Phoenix, Arizona, one of said crippled animals remained in defendant's car for a period of more than a week, and that immediately after the unloading of said shipment at Phoenix, Arizona, and almost daily from said date until the 21st day of October, 1913, the plaintiff and the agents of the Arizona Eastern Railroad Company and of this defendant, were in communication relative to the damages sustained by the plaintiff; that the nature and extent of the injuries to the one hundred and forty-seven (147) head of plaintiff's

cows which arrived at the destination alive, were such as to render it impossible for this plaintiff or any person else in the exercise of due care and diligence, to determine the amount and extent of damage sustained [50] by the plaintiff, within said ten day period; that a number of said cattle died many days after their arrival at Phoenix, Arizona, as the result of said injuries.

That on or about the 21st day of October, 1913, and after repeated efforts to arrive at any determination with the defendant and its delivering carrier, as to the extent and amount of damages sustained by the plaintiff, the plaintiff made demand in writing upon the defendant for the sum of Fifteen Hundred and Seventy Dollars (\$1,570) in satisfaction of the damages accrued to him at that time by reason of the acts of negligence set forth in his complaint, which said demand was refused. That thereafter and on, to wit, the 15th day of December, 1913, and as soon as plaintiff was able to ascertain the nature and extent of the injury and damage to his cattle as set forth in his complaint, he again made written demand upon the defendant for the sum of Twenty-six Hundred and Ninety-five Dollars (\$2,695) in full satisfaction of the damage and injuries sustained by him in the manner set forth in his said complaint, which demand was refused.

Further replying, plaintiff alleges that defendant has repeatedly waived the requirements on the part of plaintiff that he make said demand in writing within said ten-day period, in this, to wit, that defendant has on many occasions prior to the 21st day of Oc-

tober, 1913, recognized plaintiff's right to a recovery in some amount on account of his damages sustained as set forth in his complaint, and has on many occasions attempted to settle and compromise said claim with the plaintiff; that subsequent to the giving of the notice in writing on the 21st day of October, 1913, and the 15th day of December, 1913, as above set forth, defendant has attempted on two different occasions through its claim agents, [51] to adjust with plaintiff the loss and damage sustained by him as set forth in his said complaint.

WHEREFORE, plaintiff prays that defendant take nothing by reason of its second plea in bar.

HAYES & LANEY,

Attorneys for Plaintiff.

Answer.

Comes now the plaintiff in the above-entitled action, and not waiving his demurrers to defendant's pleas in bar herein, files this his amended reply to the affirmative matter set up by defendant in his second amended answer herein, by way of answer to plaintiff's complaint.

I.

For reply to paragraph number II of defendant's second amended answer, plaintiff admits that his said shipment of cattle arrived at the city of Los Angeles, California, on the 2d day of July, 1913, at about the hour of 2:35 P. M., and admits that said cattle were unloaded for feed and rest at said city, but denies that said cattle were again loaded at 3:40 P. M. on July 3, 1913, and in that behalf alleges that said cattle were reloaded at 4:40 P. M. on said date,

and moved out of said station at about the hour of 5:30 P. M., and

Further replying to said portion of the defendant's second amended answer, number II, plaintiff denies that said cattle arrived at the station of Yuma, Arizona, at about the hour of 10:35 A. M. of the 4th day of July, 1913, and in that behalf alleges that said shipment arrived at said station at about the hour of 9:00 A. M. on said day; and further replying, denies that at the time of the arrival of said cattle at Yuma, they had been confined in said cars for about twenty hours without feed and rest, and alleges that they were so confined for [52] the period of sixteen hours and twenty minutes, and no more, and plaintiff further replying, denies that it was absolutely necessary or at all necessary for the defendant company to unload said cattle at the town of Yuma for feed and rest, in order to comply with the Act of Congress therein referred to.

Further replying, plaintiff admits that defendant unloaded said cattle at the station of Yuma, but denies that defendant could not have transported said cattle beyond the station of Yuma before unloading them for feed and rest, without violating the Act of Congress referred to by defendant. Further replying, plaintiff admits that had said cattle been transported from the station of Los Angeles, to the city of Phoenix, without unloading them for feed and rest, they would have been confined in the defendant's cars for a period of approximately twenty-nine hours and no more.

Further replying, plaintiff denies that at the time

of the arrival of said cattle at Yuma, said cattle were in no condition to be kept longer in the defendant's cars, or to withstand further shipment without feed and rest, on account of the heat at Yuma and the country through which said cattle had been transported, or for any other reason.

Further replying, plaintiff denies that he did not upon the arrival of said cattle at the town of Yuma, file with the defendant or its agents, a request in writing separate and apart from any printed bill of lading or other railroad form, extending the time which said animals could be confined, from twenty-eight to thirty-six hours. Further replying, plaintiff admits that defendant had at the time of said shipment, stock-pens and corrals at the station of Gila, on its said line a distance of approximately 123 miles easterly from the town of Yuma, and in the direction in which said cattle were being transported, and admits that said company [53] did not have at said time, stock-pens or corrals at the station of Maricopa.

Further replying, plaintiff denies that upon the arrival of his said shipment at the town of Yuma, defendant either expressed a willingness or anxiety, or offered to transport his said cattle to the station of Gila, without unloading at said station of Yuma, for feed, water and rest, and further denies that he refused to permit the defendant to so forward said shipment; and in that behalf alleges that neither the agent of the defendant, nor any person in his behalf offered to transport said cattle to the station of Gila, and further alleges that the said agent of the defend-

ant made no proposition conditional or otherwise, to move said shipment for any distance whatsoever, beyond the station of Yuma, before unloading the same.

Further replying, the plaintiff is reliably informed and believes, and upon such information denies that the defendant notified its connecting carrier, the Arizona Eastern Railroad Company, by telegraph or otherwise, that said cattle were at the town of Yuma en route to Phoenix; and further denies that the defendant requested information from said Arizona Eastern, as to whether it could handle said cattle if the defendant should transport them to the station of Maricopa without feed and rest, and denies that the Arizona Eastern Railroad Company notified, advised or informed the defendant that it could not so handle said cattle from the said station of Maricopa, to place of destination at Phoenix, Arizona, within thirty-six hours from the time said cattle were loaded at the city of Los Angeles, California, but in that behalf alleges that said Arizona Eastern Company had at the time said shipment arrived at Yuma, completed arrangements with this plaintiff for meeting said shipment at Maricopa, [54] and did actually proceed to Maricopa with its said train, which said train was in fact in waiting at Maricopa to receive said shipment at the time the freight train on which said shipment arrived at Yuma, passed through the station of Maricopa.

Further replying, plaintiff denies that at the time of the arrival of said cattle at the town of Yuma, by reason of the heat at that place and the country

through which said cattle had been transported or otherwise, they were in no condition to be kept longer in defendant's cars, and denies that they were not upon their arrival at said town of Yuma, in proper condition to withstand further shipment without feed and rest, but in that behalf alleges that said shipment arrived at Yuma in good condition and that had said cars been moved forward without unloading at said station, the injuries to said cattle and the loss to the plaintiff as set forth in his said complaint herein, would not have been sustained.

For a further reply to said paragraph numbered II of defendant's second amended answer, plaintiff alleges that at the time of loading said shipment of cattle at San Luis Obispo, California, for shipment to Phoenix, as set forth in his complaint herein, said cattle were healthful, in good flesh, and in every respect in first-class shipping condition; that because of the length of time said cattle would be confined in the defendant's cars in their transportation from Los Angeles to the city of Phoenix, in accordance with the arrangements set forth in plaintiff's complaint, and hereinafter more fully set forth, plaintiff caused said cattle to be unloaded at the city of Los Angeles, in the defendant's stockyards for feed and rest, for a period of approximately twenty-six hours, and at the time of reloading said cattle at Los Angeles, they had been well fed, watered and rested, and were in first-class condition [55] to withstand shipment from said station to the city of Phoenix, Arizona.

That prior to moving said cattle from Los Angeles, the plaintiff had arranged with the Arizona

Eastern Railroad, the defendant's delivering carrier, in said shipment, to have said cattle immediately upon their arrival at Maricopa, Arizona, attached to a fast passenger train of said Arizona Eastern Railroad, and immediately transported to their destination at Phoenix, Arizona; that had said cattle been handled in accordance with the plaintiff's arrangements made as aforesaid, and in keeping with plaintiff's instructions to the defendant's agents at the town of Yuma, as set forth in plaintiff's complaint, and hereinafter more fully referred to, said cattle would have arrived at Phoenix, Arizona, at the hour of 9:30 in the evening of said July 4th, 1913, after having been confined in defendant's cars for a period of twenty-eight hours and fifty minutes. That the freight train to which plaintiff's shipment was attached, did after consuming approximately one and a half hours at the station of Yuma, for the unloading of plaintiff's cattle, arrive at the station of Maricopa at about 7:15 P. M. of said 4th day of July, 1913.

For a further reply, plaintiff alleges that had said shipment been moved from the station of Yuma without unloading, and should unavoidable delays have necessitated the unloading of said cattle prior to arrival at Phoenix, Arizona, in order to comply with the Act referred to by defendant, the defendant had other feeding stations between said town of Yuma and the city of Phoenix, Arizona, at which said cattle could have been unloaded.

For a further reply, plaintiff alleges that upon the arrival of his said shipment at the station of Yuma,

the weather at said station was extremely hot, the stock-pens [56] maintained by the defendant company at said station, very dutsy, and entirely without shade of any character, and in no wise properly and suitably equipped for receiving said shipment for feed and rest, under the climatic conditions then existing at said station of Yuma; that the defendant owed to this plaintiff, the duty of maintaining suitably equipped pens in which to receive his said stock for feed, water and rest; that at the time of the arrival of said cattle at Yuma, the plaintiff informed and advised the defendant that its said feeding and rest pens were not suitably equipped to receive his said shipment under the weather conditions then prevailing at said station, and that said cattle could not be unloaded and received in said pens in a proper and humane manner; and further advised the defendant that said cattle had been well fed, watered and rested at Los Angeles; that he had made arrangements with the Arizona Eastern Railroad Company to receive said shipment promptly on arrival at Maricopa, Arizona, and that said cattle could be shipped to Phoenix without injuring said shipment, and upon the refusal of the defendant to comply with plaintiff's request, that said shipment be moved forward in accordance with the arrangement he had made for the handling of said shipment, the plaintiff then and there delivered to the defendant's agents at said station of Yuma, the telegraph arrangements he had theretofore made with the Arizona Eastern Railroad Company, for the immediate forwarding of said cattle to Phoenix, Arizona, upon

their arrival at Maricopa, Arizona, and further tendered a request in writing, separate and apart from his shipping contract, extending the time to the defendant for unloading and resting said cattle, to the period of thirty-six hours from the date of loading said cattle in Los Angeles, and further agreed and tendered said agent in [57] writing, a full release from all liability for damage to the said plaintiff, resulting from the forwarding of said cattle, which said tender was refused by the defendant, through its said agents.

II.

For reply to paragraph numbered III of defendant's second amended answer, plaintiff admits the transportation of his said cattle in five cars, from San Luis Obispo, California, to Phoenix, Arizona, over the line of railroad operated by the defendant and its connecting carrier, the Arizona Eastern, under three contracts in writing made and entered into between the plaintiff and his duly authorized agents, Frank Whitton and James Ford, and the defendant, but has no information upon which to base a belief that the copies attached to defendant's second plea in bar, are true copies of the original contracts entered into between the plaintiff and his agents and the defendant, and therefore denies that said copies are correct copies of the original shipping contracts.

Further replying, plaintiff denies that in the handling of said shipment, the defendant and its connecting carrier fully performed each and every act required to be performed by them under the provisions of their said shipping contracts and the published

freight tariffs governing said shipments, and further denies that the defendant is exempt from liability for the losses and injuries to said livestock, as set forth in plaintiff's complaint, under the terms of said shipping contracts or otherwise, or at all.

Further replying, plaintiff admits that said shipping contracts entered into between plaintiff and his agents and the defendant, contain a proviso that in case any loss or damage should be sustained for which the defendant might be liable, that plaintiff would make demand or claim therefor in writing, to the freight claim agent of the defendant, within ten days [58] after the unloading of said cattle at Phoenix, Arizona, and that said contracts contain the further proviso that in the event of the failure of the plaintiff so to do, all claims for losses or damages in the premises, were waived, released and made void, but this plaintiff denies that he assented to the terms of said provisos or either of them.

Plaintiff admits that said cattle were unloaded and received by him on the 5th day of July, 1913, at the city of Phoenix, and admits that he did not nor did any person else, to plaintiff's knowledge, or on his behalf, make demands or claim in writing within said ten day period, to the freight claim agent of the defendant, or to the defendant or to any agent of the defendant, for the loss or damage sustained by him in said shipment; and

Further replying, plaintiff denies that it was entirely possible or at all possible for him to have given such notice in writing or at all, to the defendant or to its agents within said ten day period, after

the unloading of said cattle, for the reasons herein-after more fully set forth; and further replying, plaintiff denies that by reason of his failure or the failure of any person for him or on his behalf, to make such claim in writing within ten days after the unloading of said cattle, he waived or released all or any portion of his said claims against the defendant on account of the loss or damage to his said shipment, as set forth in his said complaint.

Further replying, plaintiff alleges that on the 4th day of July, 1913, and at all times subsequent to the arrival of said cattle at the station of Yuma, Arizona, the defendant had full knowledge and notice of the injuries and damage to plaintiff's cattle as set forth in his said complaint; that said cattle were unloaded by the defendant into its stock-pens [59] at the station of Yuma, between the hours of nine and ten o'clock A M on the 4th day of July, 1913, and between said date and the hour of 7:30 P. M. of said day, and prior to the reloading of said cattle into the defendant's cars, five of said cows died; that said cattle remained in the defendant's stock-pens at Yuma from about the hour of 10:30 A. M. of said 4th day of July, 1913, to 7:30 P. M. of said day, without any shelter or protection whatsoever from the intense heat of the sun, and were nursed and cared for during said entire period by the defendant's agents, assisted by one James Ford; that upon loading said cattle it became necessary to provide, and the defendant did provide, an additional car in which to ship thirteen of the sick and crippled cat-

tle of the plaintiff to their destination at Phoenix; that at various points between the said station of Yuma and the city of Phoenix, the train officials in charge of said shipment, received telegraphic inquiries from other officials of the defendant, inquiring as to the condition and welfare of said shipment; that upon the arrival of said shipment at Phoenix, Arizona, one of said crippled animals remained in defendant's car for a period of more than a week, and that immediately after the unloading of said shipment at Phoenix, Arizona, and almost daily from said date until the 21st day of October, 1913, the plaintiff and the agents of the Arizona Eastern Railroad Company and of this defendant, were in communication relative to the damages sustained by the plaintiff; that the nature and extent of the injuries to the one hundred and forty-seven (747) head of plaintiff's cows which arrived at the destination alive, were such as to render it impossible for this plaintiff or any person else in the exercise of due care and diligence, to determine the amount and extent of damage sustained by the plaintiff, within said ten-day period; [60] that a number of said cattle died many days after their arrival at Phoenix, Arizona, as the result of said injuries.

That on or about the 21st day of October, 1913, and after repeated efforts to arrive at any determination with the defendant and its delivering carrier, as to the extent and amount of damages sustained by the plaintiff, the plaintiff made demand in writing upon the defendant for the sum of Fif-

teen Hundred and Seventy Dollars (\$1,570) in satisfaction of the damages accrued to him at that time by reason of the acts of negligence set forth in his complaint, which said demand was refused. That thereafter and on, to wit, the 15th day of December, 1913, and as soon as plaintiff was able to ascertain the nature and extent of the injury and damage to his cattle as set forth in his complaint, he again made written demand upon the defendant for the sum of Twenty-six Hundred and Ninety-five Dollars (\$2,695) in full satisfaction of the damage and injuries sustained by him in the manner set forth in his said complaint, which demand was refused.

Further replying, plaintiff alleges that defendant has repeatedly waived the requirements on the part of plaintiff that he make said demand in writing within said ten day period, in this, to wit, that defendant has on many occasions prior to the 21st day of October, 1913, recognized plaintiff's right to a recovery in some amount on account of his damages sustained as set forth in his said complaint, and has on many occasions attempted to settle and compromise said claim with the plaintiff; that subsequent to the giving of the notice in writing on the 21st day of October, 1913, and the 15th day of December, 1913, as above set forth, defendant has attempted on two different occasions through its claim agents, to adjust with plaintiff the loss and damage sustained by him as set forth in his said complaint. [61]

III.

For his reply to paragraph number IV, of defend-

ant's second amended answer, plaintiff denies that said contracts or any of them were fairly made or entered into between the plaintiff and his duly authorized agents and the defendant, and denies that the plaintiff or his duly authorized agents or either of them, stipulated that the agreed valuation of said livestock was the sum of Thirty Dollars (\$30) per head, and denies that said valuation as was named in said shipping contracts was so placed and named by the plaintiff or by either of his agents for the purpose of securing lower freight rates or at all; and alleges that at the time of signing said contracts, neither the plaintiff nor his agents had any knowledge or information as to the value placed or to be placed upon said shipment, in said contracts, and further alleges that at the time of the signing of said contracts, no writing of any kind or nature whatsoever, was embodied therein; that the agent of the defendant as San Luis Obispo, California, placed before *his* plaintiff and his agents, the said printed forms of contract in blank, and requested the plaintiff and his agents to sign the same, and that he, the said agent, would, at his leisure, fill in said contracts and deliver them to the conductor in charge of said shipment, for delivery by him to the plaintiff and his agents. That neither the plaintiff nor any of his agents saw said contracts or any of them until they were delivered to them by a freight conductor in charge of said shipment on the second freight division of defendant's line out of San Luis Obispo, California, and that not until such time did the plaintiff or his agents have any knowledge as to the

valuation named in said contracts, or as to the terms and conditions thereof. That said valuations were arbitrarily named [62] and placed in said contracts by the agent of the defendant, without the knowledge or assent of the plaintiff or of any of his agents to said valuation, and that neither the rate to be charged upon said shipment nor the valuation to be placed upon said cattle, was mentioned or discussed by the plaintiff or his agents with the agent of the defendant; that this plaintiff is not advised of the purpose or motive of the agent of the defendant, in placing a valuation of \$30 per head on said shipment, and that had the plaintiff been permitted to insert the valuation of his said cattle in said shipping contracts, or had the valuation of his said cattle been asked by the agent of the defendant, he would have stated to said agent the true value thereof, and would not have assented to the valuation named, therein by said agent. That the defendant should not be permitted under the conditions above set forth, to limit the amount of plaintiff's recovery herein by said valuations arbitrarily made and placed in said contracts without the knowledge and assent of the plaintiff or his agents as above set forth.

IV.

Replying to the allegations set forth in paragraph numbered V, of defendant's second amended answer, plaintiff denies that his said cows were in poor, weak and starved condition at the time and place of their delivery to the defendant for shipment, but in that

behalf alleges that said cows and all of them were well-fed dairy cows in good flesh, and in every respect in robust and healthy condition; and further denies that by reason of the climatic conditions under which said cattle were raised, they were in anywise unfitted for transportation over the line of the defendant to Phoenix, Arizona. [63]

V.

Replying to paragraph number VI, of defendant's second amended answer, plaintiff admits that he has not paid the freight charges upon said shipment, and that he has not paid for the feed provided for said cattle while en route to Phoenix, for the reasons:

1st. That he has been unable to agree with the defendant or its delivering carrier, as to the amount of freight that should be paid upon said shipment under the conditions set forth in plaintiff's complaint; and

2d. For the further reason that he has been unable to adjust with the defendant or its delivering carrier, the losses sustained by him as set forth in his said complaint; and in that behalf further alleges that on the arrival of said cattle at Phoenix, Arizona, the said cattle were voluntarily delivered to plaintiff by the Arizona Eastern Railroad Company, and that any lien held by the defendant or the said Arizona Eastern Railroad Company on said cattle for said freight and feeding charges, was thereby expressly released by the voluntary act of said company; that plaintiff has at all times been and is now, ready, able and willing to pay the freight charges upon said shipment when the same is fairly and

properly measured and adjusted with this plaintiff.

WHEREFORE, plaintiff prays that the defendant take nothing by reason of its second amended answer herein.

HAYES & LANEY,
Attorneys for Plaintiff.

[Endorsements]: No. 142. In the United States District Court, for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Reply to Defendant's Second Amended Pleas and Answer. Recd. Copy. J. C. Forest, Attorney for Defendant. Filed Oct. 12, 1915, at — M. George W. Lewis, Clerk. By R E. L. Webb, Deputy. [64]

**[Order Sustaining Demurrer to Defendant's Pleas
Involved, etc.].**

*In the United States District Court for the District
of Arizona.*

Minute Entry Appearing Under Date of October
12th, 1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PAC. CO.,

Defendant.

The demurrers of the plaintiff to the defendant's pleas in bar as set out in its second amended pleas

and answer on file herein are this day argued by counsel, P. H. Hayes, Esquire, appearing on behalf of the plaintiff and J. C. Forest appearing on behalf of the defendant; and, upon consideration thereof by the Court,

IT IS ORDERED that the said demurrers be and the same are hereby sustained, to which ruling of the Court, the defendant by counsel excepts and asks that his exception be noted upon the record and the same is accordingly done by the clerk. [65]

[**Minutes of Trial—October 26, 1915.**]

*In the United States District Court for the District
of Arizona.*

Minute Entry Appearing Under Date of October
26th, 1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC CO.,

Defendant.

Trial of this cause came on regularly to-day, the plaintiff in person and with P. H. Hayes, Esquire, his counsel, and Francis M. Hartman, Esquire, and J. C. Forest, Esquire, counsel for the defendant, appearing in open court, and both sides announce themselves ready for trial. Thereupon D. H. Little is ordered appointed and sworn in as court reporter

in this case and he is accordingly duly sworn to act as court reporter in this case in open court. The Court, thereupon orders the clerk to call into the jury-box 18 jurors and their names are called and all answering thereto, respectively, take their places in the jury-box. Said jurors are thereupon duly sworn on their *voir dire*. Whereupon J. H. Allen is challenged by the plaintiff for cause and such challenge allowed by the Court and C. D. Young is called in his stead and duly sworn on his *voir dire*. Whereupon said C. D. Young is challenged for cause by the defendant and such challenge is allowed by the Court and Daniel J. Brislin is called in his stead and duly sworn on his *voir dire* and all are found to be duly qualified and accepted. Thereupon, each side strikes three names from the list and the remaining 12 on the said list, as follows: Oscar Moore, H. L. Pattee, Walter A. Moser, B. A. Neighbors, C. G. Cappel, Frank Cooper, James B. Marrs, W. D. Reading, James W. Ladd, W. T [66] Tweedy, W, D, Foreman, and Daniel J. Brislin, are selected by the clerk and are duly sworn to well and truly try the issue joined between the plaintiff and defendant herein.

Thereupon, the plaintiff by P. H. Hayes, Esquire, his attorney, reads his complaint and makes his opening statement, and Francis H. Hartman, Esquire, counsel for the defendant reads defendant's answer.

The plaintiff, then, to maintain upon his part the issue herein, calls Frank R. Stewart and James Ford as witnesses upon behalf of the plaintiff and they

are duly sworn, examined and cross-examined.

The hour of adjournment having arrived, and the trial of the case not being completed, the Court admonishes the jury and orders the further trial hereof adjourned and continued until Wednesday, October 27, 1915, at 9:30 o'clock A. M. [67]

[Minutes of Trial—October 27, 1915.]

In the United States District Court for the District of Arizona.

Minute Entry Appearing Under Date of October 27th, 1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Trial of this case is to-day resumed pursuant to an order of continuance made on yesterday, plaintiff in person, counsel for both sides and all jurors being present in court.

Chas. A. Whitfield, and C. E. Connor are called as witnesses upon behalf of the plaintiff and are sworn, examined and cross-examined. James Ford is recalled as a witness on behalf of the plaintiff for further cross-examination and is cross-examined. Frank E. Whitton and R. H. Fields are called as witnesses upon behalf of the plaintiff and are duly

sworn, examined and cross-examined. Frank R. Stewart is recalled as a witness for the plaintiff for further examination, and is examined and cross-examined. James Ford is recalled as a witness for the plaintiff for further examination and is examined and cross-examined. Frank E. Whitton and R. H. Fields are recalled as witnesses for the plaintiff for further examination and are examined and cross-examined. A. N. Gurley is called as a witness for the plaintiff and is duly sworn, examined and cross-examined. Thereupon the plaintiff rests his case.

The defense, then, to maintain upon its part the issue joined, offers Defendant's Exhibits 4, 5, 2 and 6 in evidence, and they are admitted and filed. Thereupon, William Wilson, Morris W. Howard, O. M. Shreve, A. R. Gatter and William H. [68] Francis are called as witnesses upon behalf of the defendant and are duly sworn, examined and cross-examined.

The hour of adjournment having arrived and the trial of the case not being complete, the Court admonishes the jury and orders the further trial hereof adjourned and continued until Thursday, the 28th day of October, A. D. 1915, at 9:30 o'clock A. M. [69]

[Minutes of Trial—October 28, 1915.]

*In the United States District Court for the District
of Arizona.*

Minute Entry Appearing Under Date of October 28,
1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC CO.,

Defendant.

Trial of this case is this day resumed, pursuant to an order of continuance made on yesterday, the plaintiff in person, counsel for both sides and all jurors being present in open court.

C. S. Norman, Garfield Christianson, J. J. Casey and Charles Davis are called as witnesses upon behalf of the defendant, and are duly sworn, examined and cross-examined. The depositions of Frank Witcosky, Ed Peterson, Millard Peterson, F. D. Martin, and M. E. McKirahan were read in evidence. Thereupon the defendant rests its case

C. S. Norman is recalled as a witness in rebuttal for the plaintiff and is examined. Frank R. Stewart, Frank E. Whitton and James Ford are recalled as witnesses in rebuttal on behalf of the plaintiff and are examined and cross-examined. Vernon Ford is called as a witness in rebuttal for the plaintiff and is

duly sworn, examined and cross-examined. Thereupon the plaintiff rests his case.

Thereupon, the defendant moves the Court for a directed verdict for the defendant on the grounds set out in the reporter's transcript of the testimony and said motion is resisted by the plaintiff and is argued by counsel and, thereupon, IT IS ORDERED by the Court that said motion be and the same is hereby denied, [70] to which ruling and action of the Court the defendant by counsel excepts.

The hour of adjournment having arrived, and the trial of the case not being complete, the Court admonishes the jury and orders that the further trial hereof be adjourned and continued until Friday, October 29, 1915, at 9:30 o'clock A. M. [71]

*In the United States District Court for the District
of Arizona.*

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Motion by Defendant for Directed Verdict.

Now comes the above-named defendant, Southern Pacific Company, and moves the Court for a directed verdict in its favor, and, in case said motion shall be

denied, that it have leave to go to the jury.

FRANCIS M. HARTMAN,
Tuscon, Arizona,
J. C. FOREST,
Phoenix, Arizona,
Attorneys for Defendant.

[Endorsements]: No. 142 (Phx.). In the United States District Court for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Defendant's Motion for Directed Verdict. Filed Oct. 28, 1915. George W. Lewis, Clerk. [72]

[Minutes of Trial—October 29, 1915.]

*In the United States District Court for the District
of Arizona.*

Minute Entry Appearing Under Date of October
29th, 1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC CO.,

Defendant.

Trial of this case is this day resumed pursuant to an order of continuance made on yesterday, the plaintiff in person, counsel for both sides, and all jurors being present in open court.

There being no further testimony offered, and the

evidence being closed, argument of counsel is had; the Court instructs the jury orally, the delivery of written instructions having been expressly waived in open court, the plaintiff excepting to that part of the Court's instructions to the jury as shown in the reporter's transcript of the testimony for the reasons contained in that transcript, and the defendant excepting to the portions of the instructions of the Court as shown in the reporter's transcript of the testimony for the reasons therein set out, and the plaintiff also excepting to the ruling of the Court in giving all the instructions asked for by the defendant and given by the Court, and for refusing to give all the instructions asked for by the plaintiff; and the defendant excepting to the ruling of the Court in giving all the instructions asked for by the plaintiff and given by the Court and for the Court's action in refusing to give all the instructions asked for by the defendant; and thereupon the jury retire to their room in charge of A. J. Stark and F. A. Weage, their bailiffs, first duly sworn for such purpose, to consider of their [73] verdict. After a time said jury return into court in charge of their bailiffs and, upon being asked if they have agreed upon a verdict, through their foreman, state that they have agreed. Whereupon, said jury, through their foreman, present their verdict, as follows, to wit:

“FRANK R. STEWART,

Plaintiff,

Against

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Verdict.

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and we do assess his damages at the sum of (\$2,090) Two Thousand Ninety and no/100 Dollars.

W. D. READING,

Foreman."

And the clerk inquiring of said jury if such is their verdict, they state that it is and so say they all. Thereupon, said jury is ordered discharged from the case; AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that judgment be entered in favor of the said plaintiff and against said defendant in the sum of Two Thousand Ninety and no/100 (\$2,090) Dollars, in accordance with the verdict of the jury.

[Order Extending Time to Prepare and File Bill of Exceptions.]

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC CO.,

Defendant.

Upon stipulation of counsel for both sides herein, IT IS ORDERED that the defendant be given sixty days from this date within which to prepare and file

its bill of exceptions herein and that stay of execution be granted to the defendant for the same period of time. [74]

FRANK R. STEWART,

Plaintiff,

Against

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Verdict.

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff, and we do assess his damages at the sum of (\$2,090), Two Thousand Ninety and no/100 Dollars.

W. D. READING,

Foreman.

[Endorsements]: No. 142. United States District Court, District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Verdict. Filed Oct. 29, 1915. George W. Lewis, Clerk. By ———, Deputy Clerk.
[75]

*In the United States District Court for the District
of Arizona.*

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Judgment.

This cause came on regularly to be heard the 26th day of October, 1915, before the Court sitting with a jury, the plaintiff appearing with his counsel, Messrs. Hayes & Laney, and the defendant appearing by its counsel, Messrs. Francis M. Hartman and J. C. Forest.

Witnesses were duly sworn and examined on behalf of the plaintiff and defendant, and both oral and documentary evidence introduced on behalf of plaintiff and defendant; and after arguments by counsel for plaintiff and defendant, and instructions by the Court, the jury retired in charge of bailiffs to consider of their verdict. In due time the jury returned into the courtroom with their verdict, which said verdict was duly recorded, and was in words, letters and figures as follows, to wit:

“FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Verdict.

We, the jury, duly impaneled and sworn in the above-entitled action, upon our oaths do find for the plaintiff, and we do assess his damages at the sum of (\$2,090), Two Thousand and Ninety and no/100 Dollars.

W. D. READING,
Foreman.” [76]

WHEREFORE, it is ORDERED AND ADJUDGED that the plaintiff do have and recover of and from the defendant, the sum of Two Thousand and Ninety Dollars (\$2,090), together with his costs herein incurred, taxed and allowed, in the sum of Ninety-three and 60/100 Dollars (\$93.60), together with interest on each of said sums, at the rate of six per cent (6%) per annum from date hereof until paid.

[Endorsements]: In the United States District Court for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Judgment. Recd. Copy this 30th day of October, 1915. J. C. Forest, Attorney for Defendant. Filed Oct. 30, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.
[77]

*In the United States District Court for the District
of Arizona.*

No 142—PHOENIX.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that on the twenty-sixth day of October, 1915, the above-entitled cause came on for trial before the above-entitled court and

a jury duly empaneled, Honorable William H. Sawtelle, presiding, plaintiff appearing by P. H. Hayes, his counsel, and the defendant appearing by Francis M. Hartman, and J. C. Forest, its counsel, and the following proceedings were had:

[Testimony of Frank R. Stewart, for Plaintiff.]

FRANK R. STEWART, the plaintiff, called as a witness in his own behalf, and being first duly sworn, testified in substance as follows:

Direct Examination.

By Mr. HAYES.—My name is Frank R. Stewart. I reside in Phoenix. Resided there between July 1st and 5th, 1913, at which time I shipped 152 head of cattle over the Southern Pacific Company's lines from San Luis Obispo to Phoenix. We loaded the cattle on July 1st, at San Luis Obispo, in the afternoon. Commenced loading around three o'clock. Finished about half-past five. They were dairy cows and were loaded into five cars. We got out of San Luis Obispo that night about ten o'clock. We unloaded at Los Angeles the next day, I think about noon. I accompanied the shipment from San Luis Obispo to Los Angeles, and as far as Yuma. Mr. Frank Whitten and Mr. James Ford also accompanied the [78*—1†] shipment. The cattle were in good condition when unloaded at Los Angeles. They remained in the pens there until the next afternoon, about 4:40 Pacific time, when we began loading. The cattle were fed and watered

*Page-number appearing at foot of page of original certified Record.

†Original page-number of Bill of Exceptions as same appears in Original Certified Transcript of Record.

(Testimony of Frank R. Stewart.)

well in the corrals in Los Angeles. I helped to load them. Before arriving at Yuma I received a telegram from Mr. Field, at Phoenix, who was my partner in the real estate business. I turned the telegram over to the agent of the Southern Pacific Company at Yuma. We arrived at Yuma about nine o'clock on the morning of the 4th of July, 1913, Pacific time. I went up to the office and the agent asked me, "Are you going to unload?" and I said, "No, I am going through." And he said, "Well, I will have to see about that." In a few minutes he said to me, "You will have to unload." I said, "I am not going to unload these cattle here; if you unload them, you will kill every head of cattle I have got. The cattle are cool. They are still in good shape. I don't propose to unload the cattle here in these sand pens." There is no shade there whatever. The stock-pens at Yuma were sand dunes with a fence around them, where the cattle had been trampling manure into the sand for years. It was hot as an oven. There was no shade at all. No trees. I said to the agent, "If you unload the cattle you unload them at your own risk," and he took the cattle out of my hands and unloaded them, and I left and went up town. Possibly an hour was consumed in our conference and argument with the agent with respect to unloading. Neither myself nor my men had anything to do with the unloading. I did not go back to the stockyards where the cattle were until along about five o'clock,

(Testimony of Frank R. Stewart.)

and found that five of the cattle had died, and the others were in pretty bad shape. They seemed to be stiffened up. The cattle were reloaded at Yuma at about half-past seven into six cars. We loaded the first five cars, and we had thirteen cripples in a [79—2] separate pen that the railroad company furnished an extra car to load them into. The cattle, when they left San Luis Obispo were in very good flesh. Some of them were quite fat. The cows that died at Yuma were the fattest ones. They were overcome with the heat. The shipment arrived at Phoenix on the fifth of July, about one o'clock in the afternoon. The cattle when they arrived at Phoenix were in a badly stove-up condition from the effects of the heat. I had trouble getting them out to the pasture. Several of them staggered all the way up the road. We left one of the animals in the car. We could not get her out. The majority of the cows were milking at the time we shipped them. We milked them at Los Angeles. The shipment of the cows stopped the flow of milk on some, and some of them did not give more than half what they were giving. There were five others died here after arrival. All told, twenty-five died. I had had experience prior to that time in the purchase and sale of dairy cows in the Salt River Valley, Arizona, of the grade and physical condition of these cows at the time they were loaded at San Luis Obispo. The reasonable market value of dairy cows of such grade and in such physical condition as these cows were prior to their injuries, in the Salt River

(Testimony of Frank R. Stewart.)

Valley, was eighty-five to ninety-five dollars, and some had been selling at a hundred dollars. These cows were worth eighty-five to ninety dollars a head in Phoenix. I sold forty-five head of them—agreed to sell them to a man by the name of Segrist at eighty-five dollars a head. I afterwards took the cattle back. Seventeen of them died. I sold eighty-seven head of these cattle for sixty-five dollars a head. These eighty-five head were worth in their normal condition, eighty-five dollars a head. I have sold nine animals to a man named Ross for eighty-five dollars a head. [80—3] Within three or four days after the arrival of the shipment at Phoenix the matter of my claim for damages was taken up with the Arizona Eastern Railroad. The Southern Pacific people did not say anything to me about paying the freight on the cattle, because I told them I would not pay the freight and two or three days afterwards a man from their office came to see me and I told him I would not pay the freight on the cattle until our damages was adjusted and then he came to see me three or four times after that. I first presented a claim in writing to the agent of the Arizona Eastern and the Southern Pacific Company for damage I think on the second of October. At that time I had not ascertained the whole extent of my damage. I lost some of the cattle after that. I think I next made a claim in writing in the early part of December for loss of eleven head at eighty-five dollars a head and damages to eighty-seven head of

(Testimony of Frank R. Stewart.)

twenty dollars a head and twenty dollars that I paid for care of the cattle. Some of the cattle died after December.

Cross-examination.

By Mr. HARTMAN.—I have lived in Arizona for fifteen years and in and around Phoenix for six or seven years. Been in the cattle business the last couple of years. I had shipped cattle into Arizona from San Luis Obispo, California, prior to this shipment. I shipped them in May and June. I went up to San Luis Obispo to get these cattle. San Luis Obispo is near the coast—I guess about fifteen miles. It was not as hot where I bought these cattle, at San Luis Obispo as it was here in Arizona. It was dry there at that time. There was a drouth there at that time. I knew it got pretty warm in and around Phoenix on the fourth of July and I knew that Yuma was lower in altitude than Phoenix. I know that the cattle had to go through the southern [81—4] portion of California. I know that it is warm through there. I knew that it was warm in Yuma. I don't think it was much warmer than here. I have heard that Yuma has the reputation of being a very hot town in the summer-time. I had heard that before I went to San Luis Obispo to bring these cattle into Phoenix. I selected the time for bringing the cattle in. (Witness here shown document marked for identification Defendant's Exhibit No. 4) I have seen this document before. This is my signature on the bottom at the left hand corner. I signed this

(Testimony of Frank R. Stewart.)

paper at San Luis Obispo on or about the first day of July, 1913. Mr. James Ford did not own any of these cattle. He did own some of them. I bought some from him. Thirty head of cattle were shipped in the name of James Ford. He signed one of these papers there at San Luis Obispo, on July first, 1913, while we were loading the cattle. All three of us signed one of these papers, myself, Whitten and Ford. Sixty-two head of cattle were shipped in the name of Frank Whitten. I saw him sign a paper which looked like this one (referring to document marked for identification Defendant's Exhibit No. 5). At the time that the cattle were shipped I knew that they were shipped sixty head in my name, sixty-two head in the name of Mr. Whitten and thirty head in the name of Mr. Ford at my request. I did not keep any record of the time of reloading in Los Angeles. They may have commenced loading at three twenty P. M., I am only testifying about that from my recollection. I went from Los Angeles to Yuma with the cattle. Rode in the caboose. Got to Yuma about nine o'clock in the morning. I know it was nine o'clock because I was figuring on the time I would get to Maricopa that evening. The railroad company treated the cattle the best they could I guess. They watered the cattle. When I went up to the pens at five o'clock there was water in the [82—5] troughs and I saw evidences of where they had been using water pretty generously—had wet down the dust. I can't say that I ever saw any sheds over

(Testimony of Frank R. Stewart.)

cattle-pens in Arizona. I don't have sheds in my pasture for the cattle to stay under. I have shade trees. I turn the cattle out in the pasture and let them run in the sun. I knew the railroad company did not have any cattle-pens at Maricopa. I boarded a passenger train at Yuma and came on to Phoenix. I came on here and made arrangements to take care of these cattle. I did not pay any fare. When the cattle arrived at Phoenix I drove them away without paying the freight and have not paid the freight yet. I did not surrender the original livestock contract and bill of lading marked for identification as Defendant's Exhibit No. 5 when I took the cattle from the railroad company. I kept that. Some young man down there at the freight house told me to take the cattle.

[Testimony of James Ford, for Plaintiff.]

James Ford, being called as a witness on behalf of the plaintiff and first duly sworn, testified in substance as follows:

Direct Examination.

By Mr. HAYES.—My name is James Ford. I reside at the present time about three miles north of Phoenix. Was residing at Cambria, thirty-five miles from San Luis Obispo, California, in July, 1913. During the latter part of June or the early part of July, 1913, I sold Mr. Stewart fifty-seven head of cows *a* heifers. I was paid for them. They were dairy cows. I have been in the dairy business for the last five years constantly. I have handled cattle

(Testimony of James Ford.)

and stock of all kinds since I was twenty-one years of age—for the last thirty years. I am familiar with dairy cows generally. This bunch of dairy cows I sold to Mr. [83—6] Stewart I consider an average bunch of cows—some of them above the average. Their physical condition was good. They were mixed breed—Holsteins, Jerseys, Durhams and Guernseys. I drove them from my place to San Luis Obispo. None of the cattle gave out or fell by the way side. Everyone was delivered that we started with except one that had her leg fractured. I accompanied the shipment to Phoenix. I was acquainted with the remainder of that shipment of 152 head. Some of the others were a good deal better than what I had. The others compared pretty much the same with mine. They were an average bunch of dairy cattle. I helped to unload and load the cattle at Los Angeles. Their condition was good. They were well fed and had all the water they wanted at Los Angeles. They were in fine condition when they were loaded on the cars at Los Angeles. The cattle stood the trip fine up to that time. We arrived with the shipment of cattle at Yuma about nine o'clock Pacific time. The reason I remember I saw two large clocks in the office, side by side, and one of them was nine o'clock and the other was ten o'clock. I saw Mr. Stewart have a telegram at Yuma. He gave it to one of the operators there—one of the agents. When the cattle arrived at Yuma they were in good condition as far as I could see. They were all stand-

(Testimony of James Ford.)

ing quiet and nice and perfectly cool. I went to the office with Mr. Stewart and Mr. Whitten. I know Mr. Stewart was talking very hard to keep the cattle from being unloaded, and wanted to ship them on through and wanted to sign a release for doing anything, and they argued and argued for a long time and we all three argued with them that if they unloaded the cattle there they would die from the heat. All I know is that I heard transpire between Mr. Stewart and the operator. The operator stated he would have to unload the cattle. He [84—7] had wired to Tucson. Mr. Stewart did not unload the cattle, the railroad company and the people there unloaded them. I saw the cattle-pens of the Southern Pacific Company at Yuma into which the cattle were unloaded. They were just bare corrals, right out in the open, no sheds, no shade trees or shade of any kind. The bottom of the corrals were dusty, sand and dust. I did not see the cattle unloaded. We all went over to the hotel and had our breakfast or dinner—the first we had had to eat that morning, and about an hour after that I went up to the corrals. One of the men from the office came over to the hotel and asked for Mr. Stewart. He said the cattle was getting in bad shape. I said, “Well, we had better go down there and see what can be done for them,” and when we got down there they were all pretty near dead and would have all died in a few minutes if we had not got water to them. They were overcome with the heat. They were standing about half way around

(Testimony of James Ford.)

over the water as close as they could get. Some of them were dead and some almost ready to drop and some did drop dead while I was in the corral. I told this gentleman, whoever he was, that the best thing I could see was to get water to these cattle as soon as he could and spray them, and I got buckets and wherever there was a bunch of cattle I threw water over them, and when he saw the cattle recover from the effects of the water he ordered the men in the yard there, the section hands with buckets until we had the cattle in a nice condition. That is they were cooled off and they were not suffering any more with the heat. I am accustomed to handling cattle. Pouring water on them when they were so hot would stiffen them and cripple them in a way. I observed them after that, and I remember they were pretty badly crippled. They were all fat cows, every one of them. The fattest of the cows in the bunch [85—8] died. They naturally would. The heat will kill a fat animal quicker than it will a thin one. I assisted in loading the cattle back into the cars that night—six cars. The railroad company gave us an extra car to put the cripples in—about fifteen or sixteen head. If the cattle had not had water there I think they would have all died without a doubt. There were several corrals there—four or five, and they had bunched them off in separate corrals, about a carload in a corral. We were notified about the cattle after we had had our lunch. We had lunch a few minutes after we got in. I judge it must have been along about one or two o'clock when we were notified

(Testimony of James Ford.)

about the cattle. I accompanied the shipment to Phoenix. Overheating will cause a cow to stop giving milk. I saw the cattle after they were unloaded at Phoenix. Some of them were pretty badly used up. I live in the Salt River Valley, near Phoenix, now. The feeding conditions in the vicinity of San Luis Obispo at the time these cattle were shipped—in some places the feed was pretty short. In other places they had plenty of feed. At the time I sold these cattle I was feeding them hay and letting them run on the pasture, only we had to buy alfalfa meal and crushed barley. I can't say that any of these cattle were poor. Some of them were a little thin. I would not say that any of these cattle were too poor to withstand shipping. They did stand it.

Cross-examination.

By Mr. HARTMAN.—San Luis Obispo is a good climate and the fog comes in sometimes from the ocean—quite often in the summer-time. The climate in San Luis Obispo in the summer-time is much cooler than the climate here around Phoenix, Arizona. I have been here around Phoenix about two years. It had been a pretty dry [85½—9] year around San Luis Obispo, at the time these cattle were shipped. They had a drouth. I came along with the cattle from Phoenix to San Luis Obispo to help take care of them. I did not write down the time that we arrived at Yuma. When we got into Yuma we went right over and got our dinner at the club, Mr. Stewart and Mr. Whitten and myself, and I stayed there until I

(Testimony of James Ford.)

went back to the corral. Neither one of us stayed with the cattle. We did not help to unload the cattle. The most of the country we had come through was a desert. The cattle had been in the cars quite a long time without any water, and without feed or rest, from about four-thirty P. M. the day before, I guess, until nine o'clock on the morning of July fourth. I don't suppose water would have hurt the cattle any. After we got in we went to the club house there, to get our breakfast. The cattle had water when they arrived at Yuma. I suppose if we had poured water on them immediately upon unloading at Yuma and kept pouring water on them, undoubtedly we would have kept them from getting hot and that would have saved them. If we had stayed there and poured water on them, it would have kept them from getting overheated. Mr. Stewart did not help unload the cattle. He did not help take care of the cattle at Yuma, as I know of. After Mr. Stewart left the office he went over to the hotel and we ate our breakfast or dinner. I went with him. The three of us went. When I went back to the corrals about one o'clock Mr. Stewart was not helping take care of the cattle. I saw him later in the evening. He refused to have anything to do with them. He refused to go down there and help take care of the cattle. I did not help take care of them until the cattle were dying from the heat, and then I did. I think if it was not for me the cattle would have all died. When I got down there they got the hose [86—10] and turned the water on and they got the

(Testimony of James Ford.)

hose, because I told them that water would help them. I did not attend to taking care of the cattle; I went off up town. I went over to the hotel and stayed there.

(Adjournment taken until October 27, 1915.)

October 27, 1915.

[Testimony of C. A. Whitfield, for Plaintiff.]

C. A. WHITFIELD, called as a witness on behalf of the plaintiff, and first duly sworn, testified in substance, as follows:

Direct Examination.

By Mr. HAYES.—My name is C. A. Whitfield. Reside in Phoenix, Arizona. Resided here nine years. Am in the cattle business at the present time. Was so engaged in July, 1913—buying and selling cattle—shipping them in here and selling—handled dairy cattle. Am acquainted with the market value in the Salt River Valley, at Phoenix, Arizona, during the month of July, 1913. I saw a shipment of 147 cattle which arrived in Phoenix on July 5, 1913, consigned to Mr. Stewart. I would say that the cattle were worth from eighty-five to ninety dollars.

Cross-examination.

By Mr. HARTMAN.—I saw the cattle in the stock-yards, to the best of my recollection, on July 5th, when they were shipped in here. It was right after the fourth of July, I know. I didn't take any memorandum of it at the time. They were in the pens in the yards.

[Testimony of C. E. Connor, for Plaintiff.]

C. E. CONNOR, being called as a witness on behalf of the plaintiff and first duly sworn, testified in substance, as follows:

Direct Examination. [87—11]

By Mr. HAYES.—My name is C. E. Connor. Reside about three miles north of Phoenix. Resided in Salt River Valley, Arizona, about twelve years—buying and selling dairy cattle. I was acquainted with the market value of dairy cows in the Salt River Valley during the month of July, 1913. I did not see this shipment of cattle at the time it was delivered in Phoenix. I did not see them until after they were sold, when I saw a portion of them, the cattle which Mr. Segrist bought from Mr. Stewart. I would say the market value in their normal condition would be an average of about ninety dollars.

Examination by the Court.

The opinion that I had of these cattle at the time was based on the valuation in my own estimate, comparing them with cattle that I had sold him myself. Considering the fact that I knew nothing of any of them being overheated or abused in shipment, they would have been worth ninety dollars a head at that time, assuming that they had received no injury. I did not see these cattle until some time about the fore part of August or possibly the latter part of July. They were in very poor condition and without any knowledge that they had been injured in any

way, I would say that they were worth ninety dollars apiece.

[Testimony of James Ford, for Plaintiff (Recalled).]

JAMES FORD, recalled as a witness on behalf of plaintiff, testified in substance as follows:

Cross-examination (Continued).

By Mr. HARTMAN.—(Document marked for identification “Defendant’s Exhibit No. 2” handed to witness.) I signed this paper. That is my signature. I suppose I had the original of this paper in my possession. I must have had it. I can’t produce it now. [88—12] I never have paid any more attention to it after we landed. I put it in my pocket and went back to California. I was only here four days and went back to California, and, of course, I don’t know what became of the papers. I was along with these cattle when they were being transported from San Luis Obispo to Phoenix. One carload of cattle was shipped in my name. I had to ship one carload in my name in order to come with the cattle. That is the reason the one car was shipped in my name, so I could ride free along with the cattle. I did not pay any fare from San Luis Obispo to Phoenix. I came along with the cattle to load and take care of them. I have been handling dairy cattle a good many years—fifteen or twenty years. When we arrived at Los Angeles we saw that the cattle were fed and taken care of, and I attended to that or helped to attend to it. I was right there helping to take care of the cattle. Mr. Stewart was there part of the time also. Mr. Whitten was there also. We

(Testimony of James Ford.)

were all three there. We hired milker to milk the cows in Los Angeles. I think we milked the cows twice in Los Angeles. We milk dairy cows twice a day when they are not on the road. They ought to be milked twice a day if possible. If they are not milked twice a day, it injures them somewhat. If cows go thirty-six hours without milking, it affects the cattle for the time being—is injurious to them. It is a fact that if the climate at the town of Yuma had been the same, or practically the same as the climate at San Luis Obispo, or where the cattle came from, the cattle would not have been injured at all by unloading at Yuma.

[Testimony of Frank H. Whitten, for Plaintiff.]

FRANK H. WHITTEN, being called as a witness on behalf of the plaintiff, and first duly sworn, was examined and testified in substance, as follows:

Direct Examination. [89—13]

By Mr. HAYES.—My name is Frank H. Whitten. I reside three miles north of Phoenix. Have resided in the Salt River Valley, Arizona, twenty-two years. Engaged in livestock and real estate business. I accompanied Mr. Stewart to California during the latter part of June, 1913. I went with Mr. Stewart to pass upon some milk cows for him and assist him in the purchase of some milk cows in California, about 150 head, I think. I saw all of the cattle purchased by Mr. Stewart. I am acquainted with that shipment. I accompanied the shipment from San

(Testimony of Frank H. Whitten.)

Luis Obispo to Phoenix, Arizona. At the time they were shipped they were in perfect health. Some of them were fat and some just good living condition. They were all in good, healthy, thrifty condition. I have had experience in shipping cattle and handling shipments of cattle. I would not say that there were any of these cattle that were not in suitable flesh and condition generally to withstand shipment. We shipped them in five cars. One of the shipping contracts was in my name. The cattle were unloaded and fed at Los Angeles and milked twice. Had plenty of water. The cattle were in first-class condition when they were unloaded at Los Angeles. They were in first-class condition when reloaded there. It was in the neighborhood of nine o'clock—some time in the forenoon of July fourth—when we arrived at Yuma. I would not be able to state the hour just exactly. I am figuring on the time that we got to lunch. Before that we were, perhaps, arguing around the office an hour or an hour and a half, and then we went over and had dinner, and I know I was eating about a quarter after eleven. I observed the condition of the cattle upon arrival at Yuma. We looked the cattle over when we got to Yuma, and we all remarked that cattle never shipped finer. They were in fine shape. I went [90—14] to the freight office with Mr. Stewart. We had quite an argument there for a little while. We thought we were going right through, and Mr. Stewart said, "What time do we get out of here with these cattle?"

(Testimony of Frank H. Whitten.)

And the agent said, "You don't get away to-day." And he says, "I am going out of here with these cattle this morning; I am going on to Maricopa." And he says, "You are going to unload these cattle here." And Mr. Stewart says, "We are not going to unload these cattle." And I says, "We don't want to unload the cattle at Yuma, to-day." The agent says, "I have orders; I have been ordered by the dispatcher in Tucson to unload these cattle in Yuma." I says, "These cattle will all die to unload them in that hot sun at this time of day." He says, "I can't help it, I have got orders from the dispatcher to unload them." "Well," I says, "we will do anything to release you of responsibility. Wire this man, if you can, and see if he won't let us go on through." He says, "What shall I tell him?" I says, "Tell him we will do anything but unload in Yuma at this time of day." He went off, and I supposed he wired. He stayed about twenty or thirty minutes, and he came back and says, "The dispatcher says to unload these cattle here." And Mr. Stewart says, "We don't unload here. If you unload them, you unload them at your own peril," and then he up and says, "We will have to unload them." The agent took some of the force from the office, and goes and unloads the cattle himself, and we left him. Mr. Stewart had received a telegram from some source prior to his arrival at Yuma. He handed the telegram to the agent at Yuma. The corrals of the Southern Pacific Company at Yuma at that time were per-

(Testimony of Frank H. Whitten.)

fectly good. There was white sand about half knee deep in them. There was no shade. There is no shade in any stockyards. They had water. There was no shade trees in the corrals or vicinity, and no sheds of any [91—15] sort. The cars in which the cattle were being transported had roofs on them and they were ventilated sides. I next saw the cattle after unloading at Yuma about five o'clock in the evening. I noticed there were five dead ones and the others had their tongues out and their mouths open. Some of them were stiff trying to walk around the corral. The cattle had all been wet. There was a lot of men with buckets there, and they went and got the fire department, they told me, and turned the hose on the cattle. The cattle that died were fat cows—the ones that suffered the most, and the fat ones suffered more than the thin ones. I think the cattle were reloaded about seven o'clock in the evening—completed about nine o'clock. They were loaded into six cars. I think there were thirteen that we could not get in the other cars and we had to take and tail them to get them in, and the agent gave us another car and we put these thirteen in another car. I know what I am talking about. I was right there. On the way from Yuma to Phoenix I think the conductor came to me as many as two times and said he had communications from the main office in Tucson in regard to these cattle—how they were getting on and all about them. I think we arrived at Phoenix about noon on the next day. They came through fairly good from Yuma to Maricopa.

(Testimony of Frank H. Whitten.)

I observed the cattle after they were unloaded at Phoenix. They were stiffened—quite a lot of them and about all in. I believe there were two or three left along the road. They were in bad shape. One of the cattle remained in the cars. She was taken out on a wagon and hauled out. That animal finally died. I have had experience in buying and selling dairy cows in the Salt River Valley. I know what was the market value of dairy cows in the Salt River Valley in the summer of 1913. The market value of dairy cows of the grade [92—16] and quality of this shipment, when in their normal, healthy condition, would run from eighty-five to one hundred dollars. They were a good average or a little better.

Cross-examination.

By Mr. HARTMAN.—Two cars of these cattle were shipped in my name, so I could go along to help take care of them. That is what I accompanied the cattle for, to help take care of them. Mr. Stewart, Mr. Ford and myself were all care-takers on this shipment of five cars of cows. When we arrived at Los Angeles, Mr. Stewart, Mr. Ford and myself attended to the unloading of the cattle and cared for them after that, watered them, had them milked and reloaded them. We were on the road from Los Angeles to Yuma approximately sixteen hours, I should judge, maybe a little more or less. In going from Los Angeles to Yuma you pass through some orange groves and lemon groves, then over the mountains into pasture lands and then over another mountain

(Testimony of Frank H. Whitten.)

range into a sandy desert. I suppose seventy-five miles of it is sand dunes before you get to Yuma. It seems a long ways. Part of it is dry, absolutely desert country. It is pretty warm, hot and dusty, and when we got to Yuma it was hot. San Luis Obispo, from where the cattle came, is about ten or twelve miles from the coast, I should judge. It is quite a bit hotter in Yuma than in Los Angeles where the cattle were fed and watered. When we arrived at Yuma, neither myself, Mr. Ford or Mr. Stewart helped or assisted in unloading the cattle and we did not assist in taking care of the cattle while at Yuma. After the cattle were loaded into the cars again at Yuma, we climbed on to the train along with them and came to Phoenix. We did not pay anything for our fare from San Luis Obispo to Phoenix. We went along with the cattle as [93—17] care-takers. When we arrived at Yuma, Mr. Stewart, Mr. Ford and myself went off up town. After we had this talk with the agent the three of us went off up town and took a bath and had something to eat. We did not attend to the cattle.

Redirect Examination.

By Mr. HAYES.—The Southern Pacific Company will not ship cattle unless some one accompanies the shipment. I have shipped cattle over the Southern Pacific road from Los Angeles to Phoenix without unloading. You can ship from Los Angeles to Phoenix without unloading, but you have to make arrangements for that before you ship.

(Testimony of Frank H. Whitten.)

Recross-examination.

By Mr. HARTMAN.—There were only five cars of this shipment and not enough to make a special train. They were transported in one of the company's regular freight trains. I understand there were stockpens at Gila Bend, about 125 miles from Yuma. I never unloaded there. I should judge it would have taken about ten hours to have transported the cattle from Yuma to Gila Bend.

[Testimony of R. H. Field, for Plaintiff.]

R. H. FIELD, being called as a witness on behalf of the plaintiff and first duly sworn, was examined and testified in substance, as follows:

Direct Examination.

By Mr. HAYES.—My name is R. H. Field. I reside at Phoenix, Arizona. Resided near here about five years. Was residing in the valley in July, 1913. Am acquainted with Frank R. Stewart, the plaintiff. I know of Mr. Stewart's having made a shipment of cattle from San Luis Obispo, California, to Phoenix, Arizona, in July, 1913. I rendered Mr. Stewart some service with reference to this. [94—18] I went to the office of the Southern Pacific Company, took his letter and his telegram to the office and discussed it with Mr. Gatter in the office. I made some arrangements with Mr. Gatter relative to this shipment. I had a letter from Mr. Stewart from San Luis Obispo, and I took that letter first and discussed it, and I think it was two or three days later I got a telegram from Mr. Stewart—I think it was from Los An-

(Testimony of R. H. Field.)

geles—and I also took that. I think it was some time in the late afternoon of the third of July. I had this conversation with Mr. Gatter in his office at Phoenix. He said that they would bring the cattle up. Mr. Stewart's letter was demanding that the cattle come through from Los Angeles without unloading at Yuma and they assured me that they could get it through. He said they would bring it up from Maricopa either on the passenger or on the other train, and I wired Mr. Stewart to that effect. When I wired him it was almost night. I sent a night letter. I went home when I was through. I went home at night. I was living at Buckeye at that time. That was on the evening of the third of July. I understood that the cattle would be in here, at that time, some time about nine o'clock on the fourth. I went home and attended a celebration and left there about four or five o'clock on the afternoon of the fourth and came back to Phoenix. I could not get hold of Gatter when I came in, or Scott, so I went down to the office at the depot and they told me that it was all off, that the dispatcher had absolutely refused to or that the Tucson people had refused to bring them through. I don't know where the letter or the telegram is. The telegram was addressed to me. I went to the office of the Western Union Telegraph Company, but I could not get a copy of the telegram.

Cross-examination. [95—19]

By Mr. HARTMAN.—(Witness handed paper

(Testimony of R. H. Field.)

marked for identification "Defendant's Exhibit 6.") This is something like the message I received. It is a copy of it. I don't think there is any doubt about that. At that time I lived at Liberty, 25 miles from Phoenix. I did not have any office in Phoenix at that time. I went home the third of July, twenty-five miles from Phoenix. I remember that, because it was the day before the fourth of July, and I remember coming back to Phoenix on the fourth. It was late in the afternoon of the fourth when I got to Phoenix. I went to a picnic and then came here to Phoenix.

**[Testimony of Frank R. Stewart, for Plaintiff
(Recalled).]**

FRANK R. STEWART, being recalled as a witness in his own behalf, testified in substance, as follows:

Redirect Examination.

By Mr. HAYES.—I had a communication with Mr. Fields relative to forwarding this shipment of cattle to Phoenix. I received a reply from Mr. Field. I don't know the station where I got this message, but I got it before we got into Yuma on the morning of the fourth of July. It was relative to arrangements made for the forwarding of the shipment. I gave the telegram to the agent at Yuma. As near as I can recall the wording of the telegram was, "Have arranged through Mr. Gatter to bring you up on passenger train from Maricopa to-night if you reach there in time or you will come up on a freight." I

(Testimony of Frank R. Stewart.)

think it was a night message, probably dated the third of July. I received it the morning of the fourth.

[Testimony of James Ford, for Plaintiff (Recalled).]

JAMES FORD, recalled as a witness for the plaintiff testified in substance as follows: [96—20]

Redirect Examination.

By Mr. HAYES.—I saw and heard read the telegram received by Mr. Frank R. Stewart from Mr. Field some time prior to our arrival at Yuma. It was in regard to bringing the cattle up from Maricopa as soon as possible. They were either to bring them on a freight or on a passenger.

[Testimony of Frank H. Whitten, for Plaintiff (Recalled).]

FRANK H. WHITTEN, recalled as a witness on behalf of plaintiff, testified in substance as follows:

Redirect Examination.

By Mr. HAYES.—I saw the telegram testified to by Mr. Stewart, which was received prior to his arrival at Yuma. I did not read it. He read it to me. It said “Arranged with Gatter to bring cattle up.”

Recross-examination.

By Mr. HARTMAN.—I don’t know what this message was in reply to.

[Testimony of R. H. Field, for Plaintiff (Recalled).]

R. H. FIELD, being recalled as a witness for plaintiff, testified in substance as follows:

Redirect Examination.

By Mr. HAYES.—I don't recall the wording of the telegram, but it was to the effect that they were to bring the cattle up from Maricopa.

Recross-examination.

By Mr. HARTMAN.—I received a telegram from Mr. Stewart and sent him one.

[Testimony of Dr. A. N. Gurley, for Plaintiff.]

Dr. A. N. GURLEY [97—21] a witness on behalf of the plaintiff, being first duly sworn, testified in substance as follows:

Direct Examination.

By Mr. HAYES.—My name is A. N. Gurley. I am a veterinary surgeon. I have practiced my profession twenty-five years. Resided in Phoenix four years. Am acquainted with Mr. Stewart. Was practicing my profession in Phoenix during the months of July, August, September and October, 1913. Was called in my professional capacity to see some cattle in the possession of Mr. Segrist, in the summer of 1913. Some of the cows had bad udders and two or three abortions and general debility of milk cows was about the run of their condition. I think some seven or eleven of the cows died. The effect upon dairy cows of heat prostration is that many times the animal will succumb to the attack

(Testimony of Dr. A. N. Gurley.)

and some may survive it. It generally leaves them in an emaciated condition. Generally, the milk supply would be diminished and many times it would be eliminated. Pouring water on a cow in a state of heat prostration will cause the blood supply to be concentrated, or pass to the brain, the lungs, or the heart, and sometimes direct all the circulation to those organs, and I never approved of the treatment. It also has the effect of stiffening the animal. It would probably save the animal's life in many instances. Heat prostration upon a pregnant cow many times produces abortion. Many times the animal becomes barren after the condition of abortion. Once in a while the animal will survive this condition and come out of it apparently in very good condition.

Cross-examination.

By Mr. HARTMAN.—A dairy cow ought to be milked twice a day—twice in [98—22] twenty-four hours. If they are not so milked it produces extension of the udder and if allowed to continue it will produce what we know commonly as an inflammatory condition of the udder and many times the cow will dry up. Dairy cows should be given access to water continually. Nineteen hours is too long a time for a dairy cow to go without a drink, especially in hot weather. In the kind of weather they have down at Yuma and at Phoenix. A cow is better off if she is milked; there is no question about it. These cows having been loaded on the cars in Los Angeles on

(Testimony of Dr. A. N. Gurley.)

the afternoon of July 3d, and arriving in Yuma on the morning of July 4th, in the hot season of the year like they have at Yuma, and after having been on the cars and in the cars nineteen hours, it would have been much better for them to unload and milk and water than to be transported any further. I am not familiar with the climate around Yuma in the summer, but assuming that the climate of Yuma is something like the climate around Phoenix, in my opinion, dairy cows, which are accustomed to being milked every day and given feed and water, after bringing them from a cool, moist climate, into a climate such as we have around Phoenix, here in the summer-time, in the month of July—it would cause some to become overheated or have heat exhaustion from the climatic conditions, and it would not be good for them.

Redirect Examination.

By Mr. HAYES.—Assuming that these cattle, dairy cows, after having been fed and watered at Los Angeles in the evening about five o'clock, and having been transported from Los Angeles to Yuma, in cars protected by a roof and with open sides, and arriving in Yuma at approximately nine o'clock the next morning, and that the corrals at Yuma had no shade or protection of any sort, with [99—23] sand in the bottom of them and dry manure to a depth of four to six inches, and that the temperature in the city of Yuma was approximately 112 degrees in the shade at the time of their arrival, I would think that the animals would have been better off to

(Testimony of Dr. A. N. Gurley.)

have unloaded them at Yuma and given them a drink of water than to have transported them on and kept them in motion until that evening before unloading them. You have a car of cattle and you pack that car close with cattle and their heat-generating power is greater by the confinement. No, I don't think an animal should go without water that length of time. I don't care what the laws are, that is my opinion, and I think a good fresh drink of water will lower the heat generation faster than anything else, and the point I am trying to make is this, that these cattle would have been perhaps better off if they had had a drink of water in Yuma; but supposing the cattle had been unloaded at Yuma in a corral such as has been described, entirely unprotected by shade, at the hour of ten-thirty in the morning, and remained there unprotected until seven-thirty in the evening, I think they would have been better off without the unloading.

Recross-examination.

By Mr. HARTMAN.—Cattle become feverish on the train when they are packed in the cars. Unloading them often if the pens had any covers and giving them a drink of water would tend to lower the temperature of the animals. I don't mean to say that it would have been better to have brought the cattle on to Phoenix, which would have necessitated keeping them in the cars to exceed twenty-eight hours. Assuming that the cattle would have been on the cars without feed or rest or water for approximately

(Testimony of Dr. A. N. Gurley.)

thirty-three hours and thirty minutes from the time they were loaded in Los Angeles until they would have reached Phoenix, [100—24] if they had come on through without unloading for feed and rest at Yuma, under the conditions existing there at the time, on July 4, 1913, and under the conditions existing through the country where they were transported from Los Angeles to Yuma, in my opinion I believe that the cattle would have been better off if they had been unloaded and watered and reloaded, but I don't think it is the proper thing to leave the cattle there in that condition all day.

In my opinion it would have been better to have unloaded the cattle at Yuma than to have brought them on to Phoenix without water, feed or rest.

Redirect Examination.

By Mr. HAYES.—Assuming that prior to moving the cattle out of Los Angeles they had been well fed and watered and rested, and at the time of their arrival at Yuma, under the conditions referred to, they had been in the cars sixteen hours, and that they were unloaded at Yuma about ten-thirty in the morning, and remained in the corrals until approximately seven-thirty in the evening, and assuming, further, that the shipment would have arrived at Phoenix approximately eleven hours from the stopping of the train at Yuma, I think the cattle would have been better off to have been watered at Yuma.

WHEREUPON the plaintiff rested his case and the defendant, to sustain the issues upon its part,

offered the following evidence:

The defendant thereupon offered in evidence the document theretofore identified by plaintiff, Frank R. Stewart, and marked for identification "Defendant's Exhibit No. 4," being one of the livestock shipping contracts covering the shipment; [101—25] which was admitted in evidence without objection and which document is hereinafter more fully set forth.

Defendant also offered in evidence a certain other document, marked for identification "Defendant's Exhibit No. 5," being one of the livestock shipping contracts covering the shipment, which was admitted without objection, and which is hereinafter more fully set forth.

Defendant also offered in evidence a certain other document theretofore marked for identification "Defendant's Exhibit No. 2," which was one of the livestock contracts covering said shipment; which was admitted without objection and is hereinafter more fully set forth.

Defendant also offered in evidence a certain other document, being a copy of a telegram from R. H. Field to F. R. Stewart, and heretofore marked for identification as "Defendant's Exhibit No. 6," which was admitted in evidence and which is hereinafter more fully set forth.

[Testimony of William Wilson, for Defendant.]

WILLIAM WILSON, being called as a witness on behalf of defendant and first duly sworn, was examined and testified in substance, as follows:

Direct Examination.

By Mr. HARTMAN.—My name is William Wilson. I live now at Yuma, Arizona. I lived in Tucson, Arizona, in July, 1913. My business at that time was chief dispatcher for the Southern Pacific Company. I had been such for eight years. At the present time I am trainmaster. I was chief dispatcher for the Southern Pacific Company at Tucson, Arizona, on July 4, 1913. In a general way my duties as chief dispatcher were to keep track of shipments of livestock, as to the time when they were loaded, when the twenty-eight hours or the thirty-six hours would be up, and [102—26] arrange trains to handle such shipments, furnish cars and look after movement of transportation on the division assigned to me. I had jurisdiction over that portion of the road from El Paso to Yuma and two branches and I had charge of the handling of cattle over the road. On July 4, 1913, I was working as chief dispatcher in the office at Tucson. I had something to do on July 4, 1913, with the cattle involved in this lawsuit, in the way of issuing instructions as to the unloading of the cattle. I did it all. The first thing I did was when the yardmaster at Patio, that is the freight yard office at Yuma, called me up at eleven-thirty A. M. on July 4, 1913, and said there were five cars of cattle

(Testimony of William Wilson.)

there. That is the information that came over the telegraph wire to me, that train No. 244 had arrived with five cars of cattle. This information was not recorded in writing at the time. I just listened to the instrument. It is the same as talking over a telephone, only it is in Morse Code that we used by using dots and dashes and it takes a little longer. We do not always record and preserve a record of such communications, not where a train is waiting. Not where it is to be handled within a few minutes. When the yardmaster told me over the wire that there were five cars of cattle at Yuma for Phoenix, on this train, I asked him when they were loaded and received a reply, and he says they want to go through to Phoenix. My reply was, "Wait a minute." I simply got hold of the operator at Maricopa, which is our relay or junction point, and said to him—gave him the information as to where these five cars of cattle were and destination and the time that the thirty-six hours would be up—"Can you handle?" After receiving answer or reply from the operator at Maricopa, I said to the yardmaster at Yuma over the wire "A. & E. (Arizona Eastern) can't handle. The stock will have [103—27] to be unloaded at Yuma unless they desire to come to Gila. We will try to make Gila inside of the twenty-eight hours." The wire was open for a few seconds and the reply came back to me that the gentleman in charge of the stock would hear to nothing except going to Phoenix and that if they were unloaded at

(Testimony of William Wilson.)

Yuma the cattle would be turned over to the company. I then issued instructions that the cattle be unloaded at Yuma. I issued those instructions because the A. & E. (Arizona Eastern) had advised that they could not handle inside of thirty-six hours and it was not satisfactory to the shipper to unload at Gila, and there was no place except Gila to unload between Yuma and Maricopa and no place to unload at Maricopa—no cattle-pens at Maricopa. Gila is 123 miles from Yuma. It would have taken a train about ten hours, counting the necessary delays in getting in and out of Yuma, to have gone from Yuma to Gila. I know what time that train arrived at Yuma on the 4th day of July, 1913, which brought these cattle from Los Angeles. This train arrived at Yuma at 11:35 A. M. on July 4, 1913, mountain time, which is the same as ten-thirty-five Pacific time or Los Angeles time. That same train which brought the cattle into Yuma from Los Angeles, and from which the cattle were unloaded at Yuma, arrived at Maricopa at ten forty-five P. M., July 4, 1913. We keep a record of each train that is moving over the division, the time that the men are called to go to work, the engine number, the train number, the names of the men who are on the train, the time the train departs from Yuma, and as it passes each station until it gets to its destination. I have this record here. It is called the train sheet. (Witness produces train sheet). A train sheet is started each night at 12:01 A. M. That is when the day starts. A

(Testimony of William Wilson.)

record of each movement of each train or engine is kept on that sheet for the [104—28] day's business, and the time that they pass from one station to the other is reported by the operator at that station, and the dispatcher wherever he is located, and whenever the train finally gets to the end of the run and the crew is released, that is noted on the sheet, and the sheet is kept until all the trains that started out on that sheet complete their runs for the period of twenty-four hours. This train sheet is one of the records that a railroad company keeps in the ordinary course of handling its business. (Train sheet marked for identification as "Defendant's Exhibit No. 7".) Mr. H. W. Howard, train dispatcher, was present at Tucson, in the office, at the time and heard the telegraphic conversation take place that I have just related. He was handling these trains on this train sheet from Tucson to Yuma. That is, he wrote this information down here and wrote these figures down on this train sheet as to the time of arrival and departure of trains and issued orders to these trains, that is, where they would meet and pass. Mr. Howard was handling the telegraph key at the time between Tucson and Yuma. (Witness handed train sheet marked for identification "Defendant's Exhibit No. 7."). This is one of the train sheets I have just been describing. This is a train sheet dated July 4, 1913, and covers that portion of the road from Yuma to Tucson—shows the movement of each train for the time it left until it arrived at its destination.

(Testimony of William Wilson.)

It shows a correct record of the arrival and departure of each and every train on the road between Yuma and Tucson on that day at each station where there was an operator on duty. It shows a correct record of the time that the train which brought the cattle into Yuma arrived at Yuma. It arrived at Yuma at eleven-thirty-five A. M., July 4, 1913, mountain time, or ten thirty-five Pacific time. Mr. Howard, who was on duty at that [105—29] time as train dispatcher wrote down these figures of the arrival of this train at Yuma. Mr. Howard is here. All these records and the operation of the trains were under my charge and control.

Defendant offers in evidence the train sheet heretofore marked for identification "Defendant's Exhibit No. 7," which was admitted and which is hereinafter more fully set forth.

At that time I had had about fifteen years' experience handling cattle shipments over railroads, about twenty-five years' experience altogether.

If these cattle were loaded at Los Angeles at four twenty-five P. M. on July 3, 1913, and if they had been transported on after arrival at Yuma, to Phoenix, without unloading them at Yuma, they would have been on the cars in the neighborhood of thirty-six hours and thirty minutes or thirty-seven hours.

Assuming that the cattle were loaded in Los Angeles at four forty-five P. M. on July 3, 1913, it would have been impossible to have transported them to Phoenix without unloading them at Yuma within

(Testimony of William Wilson.)

twenty-eight hours—it would have been absolutely impossible. It might have been possible to have made Gila, and when I suggested that the shipper go to Gila I took a great responsibility on my shoulders, but I was willing to take the chance. Assuming that these cattle were loaded at Los Angeles at 4:45 P. M. on July 3, 1913, and arrived at Yuma at 10:35 A. M., I understood that they had been in the cars eighteen hours and ten minutes, it would have taken that train about an hour and ten minutes to have gotten out of the yard at Yuma. That is the best we could do on a train of that kind. There was not enough of these cattle to justify running a special train. [106—30]

I don't know of any cattle-pens in Arizona, or any place else for that matter, that have sheds over them for shade for the cattle.

Cross-examination.

By Mr. HAYES.—Our cattle-pens at Gila have no shade trees about them. This freight train upon which the cattle were shipped out of Los Angeles was designated as Number 244. It is a through freight but not very fast. (Referring to train sheet.) There are two trains here scheduled "244"—two sections of 244 on that day. This train which carried this shipment of cattle into Yuma, as I understand it, on this train sheet, is second 244. The other train, designated as First 244 on the train sheet is a melon extra. That train only came from the Imperial Valley. That was a melon train of fifty-one cars, more or less. The information which came over the wire

(Testimony of William Wilson.)

from Yuma was also to the effect that this train brought the cattle into Yuma. As to the wire conversation with Yuma I am speaking from memory, but as to the reply I received from the operator at Maricopa, that is in writing and I think is in the possession of Mr. Hartman, our attorney here. (Witness handed a document.) I have seen this before. It was made under my direction at 11:48 A. M. on July 4, 1913. This is the memorandum which I had made at the time with reference to the transaction. I had figured that the thirty-six hours would be up about 4:45 A. M., July 5, 1913. Mr. Shreeve was the operator at Maricopa. This notation here "Tell DS no, can't handle them" means that "DS" was the dispatcher's call at Tucson. That is the reply received from Phoenix—"Tell DS"—that is tell me at Tucson—"can't handle."

I have a record of the time the train departed from [107—31] Yuma which brought these cattle into Yuma. It left Yuma at 12:50 P. M., July 4, 1913, one hour and fifteen minutes after it arrived from the west. In other words, it was in the yards at Yuma one hour and fifteen minutes. The train sheet shows that the train arrived at Gila at 7:20 P. M., July 4, 1913. That train would not have arrived at Gila as soon as it did if it had taken the five cars of cattle.

I made a proposition to the shipper of these cattle—suggested that they be forwarded to Gila. I suggested this to the yardmaster at Yuma. After I suggested this to the yardmaster at Yuma the wire

(Testimony of William Wilson.)

was open for a few minutes at the other end. That was after I had stated to the yardmaster at Yuma that the Arizona Eastern could not handle the cattle, that they must be unloaded and suggested to the man in charge that he come on to Gila—and then the reply comes that he has flew off the handle and turned them over to the company. I knew the weather conditions at Yuma and knew we had stock-pens at Gila. I knew the cattle, if they had been transported on from Yuma in that train would have arrived at Gila in the evening. I did not know they could have reached Gila within the twenty-eight hour period, but I was willing to take a chance and put passenger trains in the sidings if necessary in order to do something to help out. This train did actually arrive at Gila within the twenty-eight hour period. The reason that I did not direct the shipment to move on to Gila was that the man in charge says “nothing doing, I won’t unload at Yuma, Phoenix is where I am going and I won’t consent to anything else.” And another reason was, we only had an agent at Gila to unload the cattle and at Yuma we had forces and were better prepared. We had no way to take care of the cattle at Gila. We only have an agent there. The freight train crew [108—32] does not help to unload. We had feed and water at Gila—which could be obtained if the shipper is there to help out. The shipper always orders his own feed. I have never seen it handled any other way. I had nobody at Gila to unload the cattle except the agent. The distance from Gila to Maricopa is 42 miles, of which 20 is up

(Testimony of William Wilson.)

a one per cent grade. That train made the run from Yuma to Maricopa in approximately ten hours, but the reason for that was that the tonnage was reduced by taking out these cattle at Yuma, otherwise it would have been two hours longer. If the five cars of cattle had remained in that train it would have been necessary for the train to have doubled one of the hills which would have caused a delay of an hour, and with the extra five cars of cattle they would have been unable to make this time, which would have put it into Maricopa at least an hour and a half or two hours later. This train did arrive at Maricopa within about twenty-nine hours from the time it left Los Angeles, assuminig that it left Los Angeles at 5:25 P. M. of July 3, 1913. The reason Mr. Howard was in a position to hear the conversation that transpired between the yardmaster at Yuma and myself, over the wire, was that the dispatchers have a table almost as large as this one (pointing to a table in the courtroom). One instrument is attached to what is called the train wire over the entire division, and there is nobody touches that wire unless it is the train dispatcher or the chief dispatcher or the chief dispatcher authorizes it. The dispatcher is sitting there ready to send out orders at all times, or to sign up conductors' names to train orders or to put down these reports on the sheet here as the train goes by each station. Naturally, owing to the importance of the stock, this wire was used to convey the information to me, and I, being in the office [109—33] there, heard the first of the conversation, and, to be

(Testimony of William Wilson.)

frank, when they mentioned five cars of cattle, July fourth, I questioned as to what kind of a man would be doing shipping of cattle across the desert on July fourth, and I immediately came over there and used Mr. Howard's wire for the conversation and Mr. Howard took part of it himself. That is the way he knows. While one of us would be using the wire the other would be listening. If a shipper comes in and says I want to sign a release, a thirty-six-hour release to make a certain point, it is the duty of the agent to hand him the release.

[Testimony of Horace W. Howard, for Defendant.]

HORACE W. HOWARD, being called as a witness on behalf of the defendant and first duly sworn, was examined and testified in substance as follows:

Direct Examination.

By Mr. HARTMAN.—My name is Horace W. Howard. I live in Tucson, Arizona. On July 4, 1913, I was train dispatcher at Tucson for the Southern Pacific Company. I had jurisdiction over the road from Tucson to Yuma. Went on duty at eight o'clock in the morning and off at four in the afternoon. (Witness handed train sheet marked for identification "Defendant's Exhibit No. 6." I have seen this train sheet before. I had considerable to do with making it between eight in the morning and four in the afternoon of July 4, 1913. I put down most all of the figures which appear on this train sheet between eight in the morning and four in the evening. This is a correct record of the arrival of

(Testimony of Horace W. Howard.)

each and every train on the division between Yuma and Tucson on July 4, 1913. I kept all of this record between 8 A. M. and four P. M. of that day. While I was working there on July 4, 1913, I heard the conversation over the wire that took place, as related by Mr. Wilson, the witness who [110—34] preceded me, with reference to these five cars of cattle. The train came into Yuma at 11:30 in the morning and I reported to Mr. Wilson that they had five cars of stock for Phoenix, and Mr. Wilson gets in communication with Phoenix to find out whether they could handle these cattle and they said that they would have no connection. Then Mr. Wilson told me that they would have to be unloaded as Phoenix could not handle them—would have no train to handle the five cars of cattle on their arrival at Maricopa, but he suggested that they come on to Gila if this gentleman wished it, but he did not want to come so they had to be unloaded, as there would be no connection at Maricopa. I put down these figures here on this train sheet showing the time of arrival at Yuma. I was operating the train wire in my office. I was the only one who did handle it unless Mr. Wilson wanted to handle it.

Cross-examination.

By Mr. HAYES.—I am not now in the employ of the Southern Pacific Company. I have not been for two years. I have a pass from Tucson to Phoenix and return from the Southern Pacific Company—a trip pass. I expect the Southern Pacific Company

(Testimony of Horace W. Howard.)

to pay my hotel expenses here and they have paid a part of them. I think I heard all the conversation that transpired between Mr. Wilson and the Yuma and Maricopa agents, because I sat right there and I never left the office from eight in the morning until four in the afternoon. (Referring to train sheet.) I put down these figures here showing the arrival of the train at Yuma at the time this shows here or five or ten minutes after. I had been employed as a dispatcher for thirty-one years and a half. I had nothing to do with the running of trains on the Arizona Eastern Railroad from Maricopa to Phoenix. All [111—35] I had to do was to run the trains on the Southern Pacific between Tucson and Yuma.

Redirect Examination.

By Mr. HARTMAN.—I have not seen this train sheet from the time that I made it up until a few days ago. It has not been changed in any particular. These are my figures.

[Testimony of O. M. Shreeve, for Defendant.]

O. M. SHREEVE, being called as a witness on behalf of the defendant, and first duly sworn, testified in substance as follows:

Direct Examination.

By Mr. HARTMAN.—My name is O. M. Shreeve. Live at Maricopa, Arizona. Lived there about eight years. I was employed as telegraph operator for the Southern Pacific Company at Maricopa on July 4, 1913. (Witness shown document containing two

(Testimony of O. M. Shreeve.)

pages, marked for identification “Defendant’s Exhibit No. 9”.) I had a telegraphic conversation with the dispatcher at Tucson and with the dispatcher of the Arizona Eastern at Phoenix, Arizona, on July 4, 1913, with reference to these five cars of cattle. I kept a record of that conversation. This memorandum here that is marked for identification “Defendant’s Exhibit No. 9” is the record of that conversation that I made. I made this record at the time the conversation occurred. Refreshing my recollection from this memorandum, I will state the dispatcher at Tucson called me and told me to ask Phoenix if he could handle stock at ten-thirty or eleven P. M., and I asked Phoenix and he said no. The Tucson office then called me and said the man in charge of stock said he had a message from Gatter that they would handle on passenger train. I told Phoenix this and he said Gatter was expecting stock to come here at 6:00 P. M. [112—36]

Cross-examination.

By Mr. HAYES.—I did not wire to Mr. Gatter. I wired to the dispatcher at Phoenix. The dispatcher told me that Mr. Gatter expected the cattle to arrive at six P. M. I don’t know what Mr. Gatter said. I did not have any information from Phoenix that Mr. Gatter had arrived to handle this shipment on the passenger train. The information I had was that Mr. Gatter was expecting the stock to arrive at six P. M. at Maricopa. I obtained that information from the dispatcher at Phoenix. I am still in the

(Testimony of O. M. Shreeve.)

employ of the Southern Pacific Company at Maricopa. Also employed by the Arizona Eastern—both companies. I don't know what time the passenger train of the Arizona Eastern left Maricopa on the evening of July fourth, 1913.

[Testimony of A. R. Gatter, for Defendant.]

A. R. GATTER, being called on behalf of the defendant and first duly sworn, was examined and testified in substance as follows:

Direct Examination.

By Mr HARTMAN.—I am now and was in July, 1913, general agent of the Arizona, Eastern and Southern Pacific Company, in Phoenix, Arizona. I know Mr. Frank R. Stewart, the plaintiff in this case. I knew him at that time. Also Mr. Field. I heard the testimony of Mr. Field here this morning. To the best of my memory no such conversation took place between Mr. Field and myself as related by Mr. Field. I did not on the part of the Arizona Eastern Railroad Company agree or promise to handle these cattle from Maricopa to Phoenix on a passenger train or any other way. Mr. Field came into my office several times prior to the arrival of these cattle. He came once with a letter from Mr. Stewart written from San Luis Obispo, if I remember correctly. I can't [113—37] recall the exact contents of the letter. As I remember, Mr. Stewart said in the letter that he was going to ship some cattle from San Luis Obispo to Phoenix and that he wanted to run through with them from Los Angeles

(Testimony of A. R. Gatter.)

to Phoenix. I don't remember exactly what I said, but I know that I never would have said that they could come through because I could not tell. At that time I did not know and Mr. Stewart did not know when they were coming. If they arrived at Maricopa in time to connect with our train we would have brought them through. As I recall it, Mr. Field told me that he was wiring Mr. Stewart at Yuma or would wire him at Yuma, or something to that effect.

Cross-examination.

By Mr. HAYES.—I heard Mr. Shreeve's testimony. I don't disclaim entirely having talked with Mr. Field about these cattle. It may have been on July 3d that I told the dispatcher that they would probably reach Maricopa along about six o'clock. That is the last I would have heard of the cattle until July 5th, as my office was closed all day on the fourth of July and I was not there. I don't disclaim having made some arrangement with Mr. Field, but it was not for any particular train except as they would get to Maricopa coming from Yuma, as I would not know when they would reach Maricopa, only guess-work as to when they left Los Angeles. I did not arrange with Mr. Field for the forwarding of these cattle on any passenger train, even if they had arrived in time. It would not be my duty to direct the making up of a train for this purpose or the holding of any train at Maricopa for this purpose. That would be the duty of the superintendent. I could not state definitely the schedule leaving time from

(Testimony of A. R. Gatter.)

Maricopa of our passenger train on July 4, 1913. It was somewhere in the neighborhood of about [114—38] eight o'clock in the evening. We have no train crews at Maricopa. All crews are in Phoenix. If we have a sufficient number of cars of livestock and other cars to make up a train at Maricopa we would arrange our schedule to handle them, but otherwise we would not.

[Testimony of William H. Francis, for Defendant.]

WILLIAM H. FRANCIS, being called as a witness on behalf of the defendant and first duly sworn, was examined and testified in substance as follows:

Direct Examination.

By Mr. HARTMAN.—I live at Tucson, Arizona. I am rate clerk for the Southern Pacific Company and Arizona Eastern Railroad Company. Occupied that position for over five years. I have had considerable experience in handling freight rates and the computation of freight rates. I have with me here the freight tariffs showing the rates in effect on July 1, 1913, San Luis Obispo, California, to Phoenix, Arizona.

It was here stipulated by counsel for the respective parties that in July, 1913, there was more than one rate in effect on livestock, on the lines of the Southern Pacific Company and its connecting carriers, from San Luis Obispo, California, to Phoenix, Arizona. That there was in effect at such time, in accordance with the tariffs, a sliding scale of rates based upon the valuation per head of the livestock.

(Testimony of William H. Francis.)

That if the cattle involved in this suit had been shipped on a higher valuation, a higher rate would have been assessed against such shipment, in accordance with such tariffs, and that the tariffs in effect provided for such different rates in accordance with the declared valuation as specified in the livestock shipping contracts. That such tariffs are and were on [115—39] file with the Interstate Commerce Commission.

(WHEREUPON, an adjournment was taken until 9:30 A. M., the following day.)

Hearing resumed at 9:30 A. M., October 28, 1915.

[Testimony of C. S. Norman, for Defendant.]

C. S. NORMAN, being called as a witness on behalf of the defendant and first duly sworn, was examined, and testified in substance, as follows:

Direct Examination.

By Mr. HARTMAN.—My name is C. S. Norman. Am freight agent for the Arizona Eastern Railroad Company at Phoenix and was so employed in July, 1913. I have had conversations in a business way with Mr. Stewart. I remember about this shipment of cattle made by Mr. Stewart which came in here on July 5, 1913. I was on duty at that time in my office. I did not state to Mr. Stewart on or about July 5, 1913, in the freight office of the Arizona Eastern Railroad Company, at Phoenix, Arizona, or at any other time or place, that he could take these cattle away from the Arizona Eastern Railroad Company's pens without paying the freight on them. I

(Testimony of C. S. Norman.)

did not at that time or at any other time or place authorize Mr. Stewart to unload those cattle and take them away from the pens without paying the freight. I did not hear anybody in my office connected with the Arizona Eastern Railroad Company, at that time and place or at any time and place, state to Mr. Stewart that he could take these cattle away without paying the freight. Mr. Christensen was my assistant at that time. His duties were those of assistant agent. He simply acted as my representative while I happened to be out of the office. It was either his duty or mine to collect the freight charges on shipments arriving at Phoenix. I made several efforts to get Mr. Stewart on the telephone but [116—40] it was two or three days later when we got into communication with him and he came to the office and the freight bills were presented to him and he refused payment for the reason stated that he had a claim against the railroad company for damages and it was his desire to make a settlement all at one time. I asked him why he had taken the cattle without paying the freight and his reply was that he thought it was best that he should take them. He stated that he had a claim against the carrier for damages, or words to that effect. I think that was within ten days of the time that he had taken the cattle. I had been trying to get him for two or three days over the telephone but that conversation took place the first day I could get in touch with him. He did not at that time hand me any written claim for damages. He did afterwards.

(Testimony of C. S. Norman.)

Cross-examination.

By Mr. HAYES.—It is our duty to collect all freight charges prior to delivery. It is our practice now to unload cattle into the stock-pens and lock the pens until the freight is paid. It was not our practice to do that at the time this shipment came in. The man in charge is supposed to load and unload all stock consigned to himself. The man in charge is not our agent. The contract calls for the loading and unloading by the shipper. We permit them to unload cattle in our stock-pens and then we lock the pens. I did not see this shipment. I could say positively that I was notified of this shipment prior to its arrival. It was the custom to do that. The notice would probably be that so many cars of livestock would arrive. I was instructed to collect the freight charges on five car loads. The sixth car was supposedly an overflow from the balance of the five cars. It is the custom of the road to [117—41] ship overflows without charge. Whenever it is deemed best by the carrier they have every right to do so. The carrier is not limited to the number of cattle it will ship in one car. I did not decline to permit Mr. Stewart to unload his cattle. I did not have the opportunity to decline to deliver the cattle to him at the Union stockyards here in Phoenix.

Redirect Examination.

By Mr. HARTMAN.—After this we made arrangements to unload and lock the corrals.

(Testimony of C. S. Norman.)

Recross-examination.

By Mr. HAYES.—It is our custom to demand payment of freight charges upon an injured animal.

[Testimony of Garfield Christensen, for Defendant.]

GARFIELD CHRISTIENSEN, being called as a witness on behalf of the defendant and first duly sworn, was examined and testified in substance as follows:

Direct Examination.

By Mr. HARTMAN.—I live in Phoenix. Am employed as chief clerk of the Arizona Eastern local freight office in Phoenix and was so employed on July 5, 1913, the same office that Mr. Norman is employed in. I know Mr. Frank R. Stewart, the plaintiff in this case. I did not state to Mr. Stewart on July 5, 1913, in the office of the Arizona Eastern, or at any time or place that he could take his cattle away from the pens without paying the freight on them.

Cross-examination.

By Mr. HAYES.—I did not see Mr. Stewart in our office at the time of the arrival of this particular shipment, on July 5, 1913. [118—42]

[Testimony of J. J. Casey, for Defendant.]

J. J. CASEY, being called as a witness on behalf of defendant, and first duly sworn, was examined and testified in substance as follows:

Direct Examination.

By Mr. HARTMAN.—I live here in Phoenix, Arizona. I have lived in and around Phoenix for thirty

(Testimony of J. J. Casey.)

years and am now and have been in the cattle business and farming for thirty-five years. I have had experience in shipping cattle and have shipped cattle over the Southern Pacific Company's lines through Yuma. I have been to Yuma. I have seen the cattle pens of the Southern Pacific Company at Yuma. I have had occasion to see and inspect and examine other cattle-pens in other places in Arizona and in the southwest, which are used for the purpose of unloading and feeding cattle.

Q. How do the cattle-pens of the Southern Pacific Company at Yuma compare with the cattle-pens at other places in Arizona, and in the southwest that you have seen and observed?

Objection to question by counsel for plaintiff as immaterial, which objection was sustained by the Court, and which ruling of the Court was then and there excepted to by counsel for defendant.

I believe I did see some of these cattle testified about by Mr. Stewart, which he shipped in here on July 5, 1913. I saw them at the Union Stockyards at Phoenix and some of them at a later time about three or four miles west of Phoenix. The cattle that I saw were in very poor condition—that is, no flesh, very poor in flesh.

Assuming that these cattle—152 head of dairy cows shipped from San Luis Obispo, California, on July 1, 1913, left San Luis Obispo about five o'clock in the afternoon and [119—43] were transported to Los Angeles, California, and there unloaded for feed and

(Testimony of J. J. Casey.)

rest on July 2d, 1913, and reloaded at Los Angeles on the evening of July 3, 1913, leaving there about five o'clock in the evening, having remained in the pens at Los Angeles for 26 or 27 hours, and having been fed and watered while in such pens, and arriving at Yuma the next morning, July 4th, at 10:35 A. M. Pacific time, or 11:35 A. M., Mountain time, after having been transported through the Southern California desert at that season of the year, and the weather being very hot at Yuma at the time of arrival at that place, the sun shining very hot, and the cattle having been unloaded from the cars immediately after arrival at Yuma, in the middle of the day, into the pens of the Southern Pacific Company used for that purpose at that time, for unloading and feeding, the pens having no shade over them, no sheds and no shade trees, and there being white sand on the ground in the pens mixed with manure, and there being plenty of water in the pens for the cattle to drink, the cattle not having had anything to drink since being loaded on the cars at Los Angeles, and after having been unloaded into the pens at Yuma, remaining there seven or eight hours and loaded into the cars again in the evening; and if shipping the cattle on from Yuma to Phoenix, without unloading them for feed or rest would have kept the cattle in the cars from thirty-three hours and thirty minutes to possibly thirty-six hours from the time they had been loaded on the cars in Los Angeles, and assuming that the cattle were loaded into regular, ordinary stock-cars used by railroad companies, with a cover

(Testimony of J. J. Casey.)

and with openings between the slats on the side; also assuming that the cattle had been milked twice while they remained in the pens at Los Angeles, it is my opinion that it was more humane and better for the cattle to [120—44] unload them at Yuma under those conditions and give them feed, water and rest, than to have transported them on from Yuma to Phoenix without unloading for feed, rest and water, especially these cows being milk cows and dairy cows and milking. I think it would have been better for the cows to have unloaded at Yuma. It seems to me that they were going too long a time since leaving San Luis Obispo without being milked oftener than they were. It does not look to me like they would be very good dairy cows after they got here. A dairy cow should be milked at least twice a day—twice in twenty-four hours. If we miss milking a cow once—once probably in some cases would not injure and in some cases it would. It affects all animals to go eighteen hours or longer without water in the hot weather. Shipping dairy cows from a cool climate, such as they have around San Luis Obispo, California, into Yuma, Arizona, in July, in the hot summer, would make the animals want more water, and it would be rather hard on them, I should think, coming from a cool climate into a hot climate. They would be more or less affected by the heat in my judgment. Cattle which are raised here in Arizona in the hot climate can stand the climate better than cattle which are brought in from a cool climate. Cattle which are brought in here from a cool climate

(Testimony of J. J. Casey.)

are affected more by the heat in the summer than cattle which are raised here. I know that cattle, and dairy cows in particular, going eighteen hours and thirty minutes without water would be longer than they ought to go without water, and I also think that not milking them for that length of time would be just as bad. I have shipped cattle to and through El Paso, Texas. I have seen the cattle-pens at El Paso, Texas, of the Southern Pacific Company and the other railroads there at that point. None of those cattle-pens there at El Paso, Texas, [121—45] have any sheds over them for shade.

Motion by plaintiff's counsel to strike the testimony of this witness with reference to there being no sheds over the cattle-pens at El Paso, Texas. Which motion was granted by the Court, and to which ruling defendant then and there excepted.

Q. Mr. Casey, how did the cattle-pens of the Southern Pacific Company at Yuma compare with the cattle-pens in other places of like climatic conditions, with reference to having sheds over them for shade?

To which question counsel for plaintiff objected for the reason that the same was not a comparative question and had no tendency to prove or disprove any issue. Which objection was sustained by the Court, and to which ruling by the Court counsel for defendant then and there excepted.

I never saw any cattle-pens with shade over them.

(Testimony of J. J. Casey.)

Cross-examination.

By Mr. HAYES.—I have been a dairy man for a good many years before I fed cattle. For the past several years I have been a cattle feeder—purchase cattle off the range and feed and finish them for the beef market. I have shipped feeder cattle, both cows and steers, into the valley from other points within the State to and around Phoenix. I have also shipped cattle out of the State. I have shipped beef cattle from Phoenix to Los Angeles. I never have shipped from Phoenix to Los Angeles without unloading. I have shipped cattle from Phoenix to Kansas City.

Redirect Examination.

By Mr. HARTMAN.—These cattle having been kept in the cars eighteen hours and ten minutes from Los Angeles to Yuma during that season of [122—46] the year, in the hot weather, I should judge that they would be feverish and dry in a general way. After being on the cars for that length of time without water in the hot weather, and if they were turned out and given too much water to drink it would have a bad effect on them, I should think, by drinking too much water. Frequently it has been my experience that cattle that drink too much water lay down and die in a very short time.

Recross-examination.

By Mr. HAYES.—I have made shipments of cattle during the summer-time. The largest shipment I ever made was made on the 23d of June.

[Testimony of George Davis, for Defendant.]

GEORGE DAVIS, being called as a witness for defendant, and first duly sworn, was examined and testified in substance as follows:

Direct Examination.

By Mr. HARTMAN.—I live at Phoenix at present. Have lived in and around Phoenix, about all my life, about 36 years. Am in the cattle business and cattle shipping business in this country. I have shipped a good many cattle in and out of Arizona. I have heard the hypothetical question propounded to Mr. Casey. Am familiar with the cattle-pens at Yuma, Arizona. In my opinion it was better to unload the cattle at Yuma than to have shipped them on to Phoenix without unloading for feed and rest. If the cattle are kept in the cars eighteen hours and ten minutes at that season of the year in that kind of a place and through that kind of a country, the necessary result would be, if you kept them on for a period of twenty-five to twenty-eight hours, that they would begin to get tired and lay down and the others would trample over them. As an average, when they run over that [123—47] period of time, the longer you keep them in the cars the more tired they get. They get very tired and they would want a drink of water very badly after having been on the cars eighteen hours. Cattle get feverish in the cars to a certain extent and it makes them want water being confined in the cars. The cattle would be better off out in the open, even though in the sun, where

(Deposition of George Davis.)

they had plenty of room to move around than they would be crowded up in the cars. Sand mixed with manure in the cars would not hurt the cattle. We use that for bedding the cars. Sand and manure is what we bed the cars with. It is soft. That is what the cattle stand on in the cars.

It was here stipulated by the parties by their respective counsel that the record show that the same questions were propounded to this witness as were propounded to the witness J. J. Casey, with reference to sheds over the cattle pens at Yuma and other places in Arizona and in the southwest, and the same objections made by counsel for plaintiff and the same rulings by the Court were made with respect thereto, and exceptions as to the rulings then and there made by counsel for defendant.

Cross-examination.

By Mr. HAYES.—I have been in the cattle business in and around Phoenix, Arizona, for the last twenty-eight years. I am in the dairy business now. My experience in shipping has been in shipping beef cattle in to the coast—gathering and shipping for others. I have never lived in Yuma. I was never there on the Fourth of July. I have been through there during the month of July. The effect of summer heat on loose sand naturally makes it warm. I could not say that standing in the hot sand would be restful to an animal. Assuming that the corrals at Yuma [124—48] were entirely unprotected from the rays of the sun and that the cattle were unloaded

[Testimony of George Davis, for Defendant.]

GEORGE DAVIS, being called as a witness for defendant, and first duly sworn, was examined and testified in substance as follows:

Direct Examination.

By Mr. HARTMAN.—I live at Phoenix at present. Have lived in and around Phoenix, about all my life, about 36 years. Am in the cattle business and cattle shipping business in this country. I have shipped a good many cattle in and out of Arizona. I have heard the hypothetical question propounded to Mr. Casey. Am familiar with the cattle-pens at Yuma, Arizona. In my opinion it was better to unload the cattle at Yuma than to have shipped them on to Phoenix without unloading for feed and rest. If the cattle are kept in the cars eighteen hours and ten minutes at that season of the year in that kind of a place and through that kind of a country, the necessary result would be, if you kept them on for a period of twenty-five to twenty-eight hours, that they would begin to get tired and lay down and the others would trample over them. As an average, when they run over that [123—47] period of time, the longer you keep them in the cars the more tired they get. They get very tired and they would want a drink of water very badly after having been on the cars eighteen hours. Cattle get feverish in the cars to a certain extent and it makes them want water being confined in the cars. The cattle would be better off out in the open, even though in the sun, where

(Deposition of George Davis.)

they had plenty of room to move around than they would be crowded up in the cars. Sand mixed with manure in the cars would not hurt the cattle. We use that for bedding the cars. Sand and manure is what we bed the cars with. It is soft. That is what the cattle stand on in the cars.

It was here stipulated by the parties by their respective counsel that the record show that the same questions were propounded to this witness as were propounded to the witness J. J. Casey, with reference to sheds over the cattle pens at Yuma and other places in Arizona and in the southwest, and the same objections made by counsel for plaintiff and the same rulings by the Court were made with respect thereto, and exceptions as to the rulings then and there made by counsel for defendant.

Cross-examination.

By Mr. HAYES.—I have been in the cattle business in and around Phoenix, Arizona, for the last twenty-eight years. I am in the dairy business now. My experience in shipping has been in shipping beef cattle in to the coast—gathering and shipping for others. I have never lived in Yuma. I was never there on the Fourth of July. I have been through there during the month of July. The effect of summer heat on loose sand naturally makes it warm. I could not say that standing in the hot sand would be restful to an animal. Assuming that the corrals at Yuma [124—48] were entirely unprotected from the rays of the sun and that the cattle were unloaded

(Deposition of George Davis.)

into the pens in the middle of the day on July 4th, the pens being in the condition as described, loose sand and manure, certainly an animal coming out of a car would rest in such pens. It would be better than having them in the cars. At the present time I am not employed by anybody. I have never been in the employ of the Southern Pacific Company. I have frequently shipped cattle from Phoenix to Los Angeles without unloading. At times they went through all right. I could not say that every time.

Defendant offers in evidence the deposition of

[Deposition of Frank Witkosky, for Defendant.]

FRANK WITKOSKY, in substance as follows:

My name is Frank Witcosky, 27 years old, reside at San Luis Obispo, California, and am a cattle buyer. From February, 1906, to November, 1913, I was employed driving cattle in the county of San Luis Obispo, California. I saw one of these cows shipped by Mr. Stewart from San Luis Obispo. She could not travel with the others and had given out and fallen down on the road to San Luis Obispo. She was poor and weak and could not travel. In July, 1913, there was very little feed around San Luis Obispo on the range for cattle. There was no rain there that summer. It is hotter in Yuma and Phoenix, Arizona, in the month of July, than it is in San Luis Obispo.

Defendant then read in evidence the deposition of

[Deposition of Ed Peterson, for Defendant.]

ED PETERSON, in substance as follows:

My name is Ed Peterson, twenty-four years old, live in San Luis Obispo, California. My business is farming and dairying. I was so engaged in July, 1913. I helped to drive [125—49] some of these cattle into San Luis Obispo, into the cattle-pens of the Southern Pacific Company at that place. I was raised on a dairy ranch near San Luis Obispo, California, and have handled cattle for more than six or eight years. I examined and looked at these cattle shipped by Mr. Stewart at about the time they were shipped. The cattle were poor and weak. One of the cows fell down two or three miles before reaching the cattle pens at San Luis Obispo and she laid there and rested two or three hours and she was then driven into the pens where the other cattle were. The feed for stock around San Luis Obispo, where these cattle came from was dry and very short in July, 1913. No rain there that summer and very little feed.

Defendant offered and read in evidence the deposition of

[Deposition of Millard Peterson, for Defendant.]

MILLARD PETERSON, in substance as follows:

My name is Millard Peterson. Twenty-three years old. Reside at San Luis Obispo, California. Occupation farmer. I helped to drive these cattle into the cattle-pens at San Luis Obispo, California. I was raised on a cattle ranch. Have handled cattle

(Deposition of Millard Peterson.)

almost all my life. I examined and looked at these cattle shipped by Mr. Stewart. They were in very poor condition and weak. One of the cows gave out on the road after it had laid down a couple of times on the road and had to rest for several hours before we could get her to the railroad cattle pens in San Luis Obispo. Some of the cows were quite old. There was very little rain in 1913 in the country where these cattle came from. The only stock feed was grass and that was dry and very scarce and short.

Defendant offered and read in evidence the deposition of

[Deposition of F. D. Martin, for Defendant.]

F. D. MARTIN, [126—50] in substance as follows:

My name is F. D. Martin. Fifty-eight years of age. Reside in Los Angeles, California. I am corral keeper for the Southern Pacific Company at Los Angeles, California. Was so employed on July 2d and third, 1913. I unloaded, fed, watered and reloaded this shipment of cattle in Los Angeles. I made a record of the unloading and reloading of this shipment in a permanent volume kept by me, showing the time we began to unload the shipment and the time we began to reload the same. I now produce the original record that I made at the time of unloading and reloading this shipment, which the notary has marked exhibit "A." The cattle were unloaded at Los Angeles at 2:45 and 3:00 P. M. on

(Deposition of F. D. Martin.)

July 2, 1913, and were reloaded at 3:40 and 4:25 P. M. the following day, July 3, 1913, remaining in the pens in Los Angeles more than twenty-four hours. While the cattle remained in the pens in Los Angeles they were fed three times, had water in the troughs all the time and kept clean, so that the cattle were well cared for at Los Angeles.

Defendant offered and read in evidence the deposition of

[Deposition of M. E. McKirahan, for Defendant.]

M. E. McKIRAHAN, in substance as follows:

My name is M. E. McKirahan. Residence San Francisco, California. Business freight claim agent of the Southern Pacific Company. On July 1, 1913, and until March 31, 1915, inclusive, I was chief clerk to the Freight Claim Agent of the Southern Pacific Company, in offices located on the third floor of the Flood Building, San Francisco. Since April 1st, 1915, I have been freight claim agent of the Southern Pacific Company, same location. So far as any knowledge I had of any claim having been filed by Mr. Stewart for loss or damage to this shipment, or so far as any knowledge that the freight claim department of [127—51] the Southern Pacific Company had of any such claim the only claim that was filed was received by the Freight Claim Department on or about January 18, 1914.

Defendant here rested its case and the plaintiff offered the following testimony in rebuttal.

[Testimony of C. S. Norman, for Plaintiff (in Rebuttal).]

C. S. NORMAN, being called as a witness on behalf of the plaintiff in rebuttal, testified in substance as follows:

Direct Examination.

By Mr. HAYES.—I made a search of our records for the documentary evidence requested with reference to this shipment. I did not find anything in the way of advance notice that there was any damage to the livestock coming to Phoenix. I have some messages here which I will turn over to you. (Papers handed by witness to plaintiff's counsel.) I cannot find any advance notice of the arrival of this shipment. The notice of the number of cattle being shipped and the amount of freight charges required to be collected is contained in these way bills that accompanied the cattle to destination.

[Testimony of Frank R. Stewart, for Plaintiff (Recalled in Rebuttal).]

FRANK R. STEWART, being recalled as a witness on behalf of the plaintiff in rebuttal, was examined and testified in substance as follows:

Direct Examination.

By Mr. HAYES.—While at Yuma, Arizona with this shipment of cattle, and while in conversation there with the Agent he did not make any statement to me with respect to forwarding the shipment to Gila. Gilas was not mentioned. There was nothing said there at that time with respect to forwarding

(Testimony of Frank R. Stewart.)

this shipment any distance beyond Yuma. I am not acquainted with either Mr. [128—52] Ed Peterson or Millard Peterson or Frank Witcosky. Neither of these gentlemen to my knowledge had anything to do with assisting in driving these cattle into San Luis Obispo. I did not employ Witcosky in any capacity. No animal embraced in this shipment gave out in the course of driving into San Luis Obispo. We did not have any trouble with any animal other than the one which had its leg fractured while being dipped. I had more than one conference with persons purporting to be or representing themselves to be claim agents of the Southern Pacific Company. A gentleman called on me at Phoenix, stating his residence to be at San Francisco and further stated that he was claim agent of the Southern Pacific Company and took up the question of settlement or adjustment of my claim for damages. That was within four or five days from July 5, 1913. I would say I had two conferences with this agent. I also had conferences with the Arizona Eastern local representatives relative to the adjustment of this claim.

**[Testimony of Frank E. Whitten, for Plaintiff
(Recalled in Rebuttal).]**

FRANK E. WHITTEN, being recalled as a witness on behalf of plaintiff in rebuttal testified in substance as follows:

Direct Examination.

By Mr. HAYES.—These cows were driven in three

(Testimony of Frank E. Whitten.)

different bunches into San Luis Obispo, to the best of my knowledge. I was not acquainted with all the gentlemen who did the driving. I don't know Ed Peterson or Millard Peterson. Some people did some driving on some small bunches that I don't know. There was none of the cows gave out driving them into San Luis Obispo. I don't know the witness Witeosky. I heard all the conversation that transpired between the Yuma Station Agent, Mr. Stewart, Mr. Ford and myself, relative to the forwarding of [129—53] this shipment from Yuma. No proffer was made by the agent to forward this shipment from Yuma to Gila. The station Gila was not mentioned.

Cross-examination.

By Mr. HARTMAN.—I did not assist in driving any cattle into San Luis Obispo myself, but I was there when they all came in. I don't know who drove in the small bunches.

[Testimony of James Ford, for Plaintiff (Recalled in Rebuttal).]

JAMES FORD, being recalled as a witness on behalf of plaintiff in rebuttal was examined and testified as follows:

Direct Examination.

By Mr. HAYES.—I helped drive part of these cattle into San Luis Obispo. I have forgotten how many were in that bunch. I am acquainted with two Peterson boys, brothers that used to live out there. No person by the name of Peterson had anything to

(Testimony of James Ford.)

do with driving these cattle into San Luis Obispo. There was not any cattle which gave out on the way except one that had her leg fractured and that I know was left behind. I was present at Yuma during the entire conversation there with the Agent relative to unloading these cattle. The Station Agent at Yuma did not make any statement or proposition with reference to forwarding this shipment to Gila, Arizona. The word Gila was not mentioned in my knowledge. There was no proposition made to transport the cattle to any intermediate point between Yuma and Phoenix.

Cross-examination.

By Mr. HARTMAN.—The Peterson boys may have helped drive some of those other bunches of cattle in, I don't know about that. I didn't [130—54] see them at the stockyards. I was not along with the other bunch of cattle.

[Testimony of Vernon Ford, for Plaintiff (in Rebuttal).]

VERNON FORD, being called as a witness on behalf of plaintiff in rebuttal and first duly sworn, was examined and testified in substance as follows:

Direct Examination.

By Mr. HAYES.—I am the son of James Ford. Am eighteen years old. I assisted in driving some of these cattle into San Luis Obispo. I don't know Ed Peterson. I know Millard Peterson. I don't know Witcosky. No strangers had anything to do with driving any of the cattle into San Luis Obispo,

(Testimony of Vernon Ford.)

the particular cattle which I assisted in driving.

WHEREUPON, both parties rested and the foregoing, including the exhibits as set forth herein, constitutes all the testimony and evidence in the case.

THEREUPON, and before the Court charged the jury, and before argument, the defendant submitted its motion in writing for a directed verdict in its favor, and that in case said motion be denied it have leave to go to the jury; which motion for a directed verdict was denied by the Court. To which ruling of the Court defendant then and there excepted.

WHEREUPON, and before the Court charged the jury, the plaintiff requested the following instructions:

[Instructions to the Jury Requested by Plaintiff.]

“1. The law prohibits a carrier engaged in interstate transportation of livestock, from confining the animals for a longer period than twenty-eight consecutive hours without unloading them in a humane manner into properly equipped pens for rest, feed and water for a period of at least five consecutive hours, unless prevented from doing so by some accidental [131—55] or unavoidable cause. The law further provides that the owner or agent in charge of any shipment, may by written request separate and apart from the shipping contract, extend the time for which the animals may be confined to a period of thirty-six hours.

Charge No. 1 was not given by the court and therefore must not be made a part of the record on appeal.

WM. H. SAWTELLE,

Judge.

“2. It is as much the duty of such carrier to unload in a humane manner, and into properly equipped pens, as it is his duty not to confine the animals for a period of time in excess of twenty-eight hours without written request of the shipper extending the time, and if you believe from the evidence in this case, that the defendant did not have properly equipped feed and rest pens at the station of Yuma, having in mind the climatic condition prevailing at Yuma at the time of such unloading, and that the defendant unloaded plaintiff's cattle into such improperly equipped feed and rest pens, and that the cattle were injured and damaged thereby, then the defendant is liable to the plaintiff for all such damage and injury.

Charge No. 2 was not given by the Court and therefore must not be made a part of the record on appeal.

WM. H. SAWTELLE,

Judge.

“3. If you believe from the evidence in this case, that the plaintiff orally offered to sign and deliver to the defendant, a release extending the time for which said shipment could be confined to the period of thirty-six hours, and that defendant's agent stated to him that such release could not be accepted, and that he had no other alternative but to unload, then such conduct on the part of the plaintiff and defendant constitutes a tender of such release, and the

plaintiff was not required to formally prepare and deliver to the defendant's agent, his release in writing. You are instructed that it is a general rule, that when the tender of performance of an act is necessary to establishment of a right against another party, this tender of offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused.

Charge No. 3 was not given by the Court and therefore must not be made a part of the record on appeal.

WM. H. SAWTELLE,

Judge. [132—56]

"4. If you believe from all the evidence in this case, that the defendant was negligent in the handling and transportation of plaintiff's cattle, and that such negligence amounted to wanton and willful misconduct on the part of the defendant, then you may disregard if you like, the limitation of valuation fixed in the livestock shipping contract, in estimating plaintiff's damages for the death of his cattle, if you find that any were killed, and find for plaintiff in whatever amount you believe from the evidence to be the actual value of the cattle so killed.

Charge No. 4 was not given by the Court and therefore must not be made a part of the record on appeal.

WM. H. SAWTELLE,

Judge.

"5. If you believe from all the evidence in this case, that the defendant was negligent in the handling and transportation of plaintiff's cattle, and that such negligence amounted to wanton and willful misconduct on the part of the defendant, then I instruct

you that you are at liberty to award to plaintiff punitive or exemplary damages, not however to exceed to sum of one thousand dollars (\$1000) the amount asked for in his complaint, in addition to such sum as you may find as compensatory damages for the actual loss and damage sustained.

Charge No. 5 was not given by the Court and therefore must not be made a part of the record on appeal.

WM. H. SAWTELLE,

Judge.

“6. If you believe that eighty-seven head of plaintiff’s cattle or any lesser number were damaged as set forth in plaintiff’s complaint and as a result of the negligent handling and transportation of his cattle by the defendant, you may award the plaintiff damages in a sum not exceeding twenty dollars (\$20) per head, the amount alleged in plaintiff’s complaint, and I further instruct you that in arriving at the damage suffered by plaintiff, you may consider the market value of the cattle in their normal and healthful condition, of the grade and quality of plaintiff’s cattle in the Salt River Valley at the time the injuries to his cattle were sustained, and [133—57] you may then consider the price for which plaintiff sold his cattle in their injured condition if you find from the evidence the cattle were injured and the difference in their market value in their normal condition and their value in their injured condition, is a proper measure of plaintiff’s damages.

“7. If you believe from the evidence in this case, that the defendant had actual knowledge of the

damage and injuries to plaintiff's cattle, then no notice in writing of such damage and injury was required to be furnished the defendant by the plaintiff.

Charge No. 7 was not given by the Court and therefore must not be made a part of the record on appeal.

WM. H. SAWTELLE,

Judge.

"8. If you find from the evidence that the defendant had other corrals on its line of road and in the direction in which plaintiff's shipment was moving, into which plaintiff's cattle could have been unloaded within the twenty-eight hour period and in a more humane manner than by unloading at Yuma under the circumstances developed in this case, then it was the defendant's positive duty to transport said cattle to such station for unloading."

WHEREUPON, at the close of the evidence, and before the Court charged the jury, the defendant requested the following instructions:

[Instructions to Jury Requested by Defendant.]

"1. If you believe from the evidence that at the time the cattle mentioned in plaintiff's complaint, arrived at Yuma, Arizona, on the line of railroad operated by the defendant, they had been confined in the cars approximately nineteen hours, without feed and rest, and that plaintiff did not tender to or file with defendant or any of its agents any written request separate and apart from any printed bill of lading or other railroad form, authorizing defendant to confine said animals in said cars for a period of thirty-six hours from the time they had been loaded

into such cars; and that defendant could [134—58] not or was not reasonably sure of transporting said animals from said town of Yuma, in said cars, to Phoenix, Arizona, the place of destination, without confining said animals in said cars for a longer period than twenty-eight hours, then your verdict should be in favor of the defendant.

“2. If you believe from the evidence that at the time said animals arrived at Yuma, Arizona, they had been confined in the cars approximately nineteen hours without feed or rest, and that at said time and place plaintiff tendered to or filed with defendant or its agents, a written request authorizing defendant to confine said animals in cars without feed or rest for thirty-six hours from the time they had been loaded; and you also believe that the Arizona Eastern Railroad Company, the connecting carrier of this defendant, notified defendant *that* the time said animals so arrived at Yuma, or shortly thereafter that it the said Arizona Eastern Railroad Company could not handle said shipment of cattle from Maricopa to Phoenix and get them to Phoenix, the place of destination, within thirty-six hours from the time they had been loaded, then you are instructed that plaintiff cannot recover and your verdict should be in favor of defendant.

“3. If you believe from the evidence that at the time said cattle arrived at Yuma, Arizona, defendant was willing and offered to transport said animals to the station of Gila on its said line of railroad, and there unload said animals for feed and rest, instead of unloading same at Yuma, and that plaintiff refused

to allow said animals to be so transported to said station of Gila, or declined to accept or accede to defendant's said offer to transport said animals to said station of Gila, then you are instructed to find in favor of the defendant. [135—59]

“4. If you believe from the evidence that at the time said animals arrived at Yuma, Arizona, they had been confined in the cars approximately nineteen hours without feed and rest, and that it was more humane and better for said cattle to unload them at Yuma for feed and rest than to transport them beyond that point and keep them confined in said cars, then your verdict should be in favor of the defendant.

“5. If you believe from the evidence that it was less injurious to said animals to unload them at Yuma for feed and rest than to have kept them confined in said cars for nine hours or eighteen hours longer, then you should find for the defendant.

“6. If you believe from the evidence that plaintiff made and entered into with defendant the written contracts as pleaded by defendant, providing that in case *of* any loss or damage should be sustained to said animals in said shipment for which defendant would be liable, that plaintiff should make written demand on defendant within ten days after unloading said animals at destination; and that it was possible for plaintiff to have made such demand within such time, then you are instructed that plaintiff cannot recover *fro* any loss or damage to any of the animals so delivered at destination; but you are further instructed that as to any animals that may

have died in transit, or at destination while the same were still in the possession of the railroad company, plaintiff was not required to give such notice.

“7. Defendant has pleaded that the animals mentioned in plaintiff’s complaint were transported by it and its connecting carrier under three certain contracts in writing, the execution of which contracts plaintiff has admitted.

These contracts provide, among other things, that in case [136—60] any loss or damage resulted to said animals in transporting same, for which defendant would be liable, the plaintiff would within ten days after unloading same at destination, make written demand upon defendant therefor, and that in the event of failure to make such written demand within such time that all claims for such loss or damage were expressly waived and made void.

You are instructed that such a provision is reasonable and that if it were possible for plaintiff to have given such notice within such time and he did not do so, then you are instructed that plaintiff cannot recover of defendant for any loss or damage to any of the animals delivered to him at destination; but that said provision as to such notice does not apply to any animals that may have died in transit or at destination before being taken away from unloading pens at destination.

“8. If you believe from the evidence that any of the animals mentioned in plaintiff’s complaint died within ten days after unloading at destination and that plaintiff did not make written demand upon defendant or any of its agents within ten days after

such unloading for loss or damage to such animals, then you are instructed that plaintiff cannot recover anything for such animals.

“9. If you believe from the evidence that plaintiff knew, or could have known by the exercise of reasonable diligence, within ten days after unloading said animals at destination that eighty-seven head of said animals were injured or damaged in the sum of twenty dollars per head, as alleged by plaintiff, and plaintiff did not, within ten days after unloading said animals at destination make written demand upon defendant or any of its agents for such alleged loss or damage, then you [137—61] are instructed that plaintiff cannot recover for such alleged loss and damage.

“10 If you believe from the evidence that plaintiff could, within ten days after unloading said animals at destination, have given written notice to defendant or any of its agents, of any of the loss or damage to any of the animals, for which plaintiff is seeking to recover, and that he did not give such notice within such time, then you are instructed that plaintiff cannot recover for any of the alleged loss or damage to said animals, for which he could have given such notice, but you are further instructed that plaintiff was not required to give such notice as to any animals that may have died in transit or at destination before being removed from unloading pens.

“11. If you believe from the evidence that plaintiff, at the time said animals were delivered by him to defendant, at San Luis Obispo, California, for transportation by defendant, over its line of railroad

and the line of railroad of its connecting carrier to Phoenix, Arizona, made and entered into the contract or contracts in writing, as set forth and pleaded by defendant, wherein and whereby it was agreed and stipulated by and between plaintiff and defendant that the agreed valuation of said animals was the sum of thirty dollars per head; and that plaintiff, by reason of said stipulation that the value of said animals was the said sum of thirty dollars per head, thereby obtained lower and cheaper freight rates for the transportation of said animals from San Luis Obispo, California, to Phoenix, Arizona, than would have been applicable to or assessed upon said shipment had a higher valuation been placed upon said animals; and that plaintiff by said contracts stipulated and agreed that in case any loss or damage should be sustained to said animals for which defendant would be liable, that the amount [138—62] to be claimed by plaintiff for each of said animals, so lost or damaged should be adjusted on the basis of the value of such animals at the time and place of said shipment, to wit, on July 1st, 1913, at San Luis Obispo, California; not exceeding the declared and agreed value thereof, to wit, the sum of thirty dollars per head; and you further find that the loss and damage to plaintiff's said animals, as alleged, was caused by the negligence of defendant as alleged by plaintiff, to wit, the unloading of said animals at Yuma, Arizona; then you are instructed that plaintiff cannot in any event, recover herein, any greater sum for the animals that died in transit or before being removed from pens at destination; then

the said sum of thirty dollars per head and the freight charges on same; and you are further instructed that plaintiff's claim for the animals alleged to have been injured in such transportation should be adjusted on a basis of said declared and agreed valuation of thirty dollars per head and the freight charges on same from San Luis Obispo, California, to Phoenix, Arizona; and that if said animals after delivery at destination to plaintiff were of the value of thirty dollars per head, and the freight charges on same from San Luis Obispo, California, to Phoenix, Arizona, plaintiff is not entitled to recover anything for any of said animals alleged to have been injured.

"12. If you believe that the freight tariffs of the defendant and its connecting carrier, with reference to rates applicable to transportation of livestock from San Luis Obispo, California, to Phoenix, Arizona, in July, 1913, were on file with the Interstate Commerce Commission, and posted and published; and that such tariffs provided for different rates of freight on livestock between such points, based upon declared or agreed valuation; and that at such time said tariffs provided for all higher freight rate on such livestock if a greater value [139—63] than thirty dollars per head should be fixed or placed upon such animals; then you are instructed that plaintiff is charged with knowledge of such higher rate and was bound to know that such higher freight rate was in effect, when he made this shipment.

"13. You are instructed that if the contracts

pleaded by defendant were fairly made and entered into between plaintiff and defendant, and said contracts recite on their face that the consideration therefor was a reduced rate for transportation of said animals, then you are instructed that the law presumes that a *fari* consideration was given and such consideration need not be proven.

“14. You are instructed that the law requires a shipper of livestock, or any other property, by railroad, from a point in one State to a point in another State, to pay to the carrier, so transporting such property, the full, correct amount of freight charges for such transportation, in accordance with the tariffs of such carriers filed with the Interstate Commerce Commission and posted and published, and in effect at time of such shipment; and if you believe from the evidence that plaintiff has not paid to defendant or to its connecting carrier such freight charges on the shipment of cattle involved herein, then you are instructed that plaintiff is not entitled to recover.

“15. If you believe from the evidence that the alleged loss and damage to plaintiff's animals was due to any other cause than unloading them at Yuma, Arizona, then you are instructed that plaintiff cannot recover and your verdict should be in favor of defendant.

“16. If you believe that at the time plaintiff shipped his said animals from San Luis Obispo, California, they were in a poor weak or starved condition, and that any of the loss or [140—64] damage

to said animals, as alleged by plaintiff was due to the condition of said animals at the time they were so shipped then you are instructed that plaintiff cannot recover herein of defendant, for such loss or damage.

“17. If you believe from the evidence that plaintiff caused said cattle to be brought from a cool and moist climate into Arizona, in July, and into an extremely hot and dry climate, and that plaintiff knew of the climatic conditions then existing in Arizona, and the place or places to which he caused said animals to be transported; and any of the alleged loss or damage to said animals was due to such climatic conditions, then you are instructed that plaintiff cannot recover of defendant for such loss or damage.

“18. You are instructed that if plaintiff failed or neglected to attend to unloading his cattle at Yuma, or failed or neglected to properly care for his said cattle while they were at Yuma, and that any of the alleged loss or damage was due to such failure on the part of plaintiff to attend to and care for said cattle, that defendant is not liable therefor and plaintiff cannot recover for any such loss or damage.

“19. You are instructed that plaintiff cannot recover of defendant for any loss or damage to his cattle resulting from heat or climatic conditions, and if you believe that the alleged *lossoor* damage to plaintiff's cattle was due to the heat at Yuma, or to the climatic conditions at that place, then your verdict should be in favor of the defendant.

“20. You are instructed that plaintiff cannot recover anything from defendant in this action on

account of the alleged injuries and damages to the eighty-seven head of cattle mentioned in plaintiff's complaint.

"21. You are further instructed, as a matter of law, that [141—65] plaintiff is not entitled to recover anything in this action, from defendant, for punitive or exemplary damages.

WHEREUPON, the Court charged the jury as follows:

Instructions of Court to Jury.

"Gentlemen of the Jury: This is an action brought by Frank R. Stewart against the Southern Pacific Company to recover from said defendant company the sum of \$2,695, compensatory damages and one thousand dollars punitive or exemplary damages for alleged damage and injury to stock shipped by the plaintiff over the lines of the defendant company from San Luis Obispo, California, to Phoenix, Arizona. The defendant, in its answer, denies substantially all of the allegations of the plaintiff's complaint, and in addition thereto, sets up certain matters of defense; thereupon the plaintiff has filed a reply to defendant's answer and special pleas. The complaint, answer and reply have all been read at length in your presence and hearing and I deem it unnecessary at this time to again read them. While it is the province of the Court to deal with the law of the case, it is exclusively your province to pass upon the facts. It is your duty to consider the evidence in the case as a whole, and not to give undue importance to minor points or portions of the evidence

taken piecemeal. Any case involving much testimony and many facts should not be decided upon the probability or improbability of any point singled out of the evidence, but a proper decision requires due consideration to be given to all the evidence, direct and circumstantial, in the case.

I charge you that you are made by law the sole judges of the facts in this case, and of the credibility of each and all of the witnesses who have testified in the case, and of the weight you will give to the testimony of the several witnesses who have appeared before you. In determining the credibility [142—66] of any witness and the weight you will give to this testimony, you have the right to take into consideration his manner and appearance while giving his testimony, his means of knowledge, any interest or motive he may have, if shown, and the probability or improbability of the truth of his statements, when considered in connection with the other evidence in the case. If you believe that any witness has wilfully sworn falsely to any material fact, then you have the right to wholly disregard the testimony of such witness, except in so far as his statements may be corroborated by other credible evidence in the case and by the facts and circumstances proven in the case. It will be your duty in arriving at a verdict in this case to be governed by the evidence in the case, and the law as herein given you, regardless of the condition of the parties hereto, financially, or of the effect of your verdict upon the parties, or either of them. You are to look at the evidence in this case in a common sense light, and to judge it by that ex-

perience and observation of human affairs of which you are possessed as individual members of society, and to endeavor to arrive at the truth as the evidence shows it to be.

By burden of proof, wherever used in these instructions is meant this: That the party upon whom the burden of proof devolves must prove or make out his contention by a preponderance of the evidence. It is the duty of the plaintiff in this case to make out his case by a preponderance of the evidence. The expression, "preponderance of the evidence," means the greater weight of the evidence. It does not necessarily mean that a greater number of witnesses shall be produced upon one side or the other, it means the more convincing proof or the greater probability of the truth of the evidence on one side when compared with, or weighed against, the evidence in opposition. [143—67]

You are instructed that direct evidence is not the only evidence which may be considered by the jury. In many cases, circumstantial evidence is both admissible and competent for the consideration of the jury. In arriving at a verdict in this case, as heretofore stated, it is your duty to consider all of the evidence, both direct and circumstantial. Circumstantial evidence is proof of certain facts and circumstances in a given case from which the jury may infer other and connected facts, which usually and reasonably follow, according to the common experience of mankind.

You will observe, gentlemen, that among the allega-

tions in the plaintiff's complaint, is one to the effect that the alleged loss of and injury to the cattle of the plaintiff, was a direct and proximate result of negligent conduct on the part of the defendant company, its agents and employees, in handling and transporting the shipment. In other words, this particular allegation charges negligence on the part of defendant. By negligence is meant the want of reasonable or ordinary care which, under the same conditions and circumstances, would be exercised by persons of ordinary prudence and foresight. Negligence may consist of an act or of failure to act. It is, therefore, such an act as a person of ordinary care, under existing conditions and circumstances, would not do, or such a failure to do something which, under existing conditions and circumstances, a person of ordinary care would have done; or, as the Supreme Court of the United States has said: "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation or doing what such person, under existing circumstances, would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and [144—68] measured by the exigencies of the occasion." The law prohibits a carrier engaged in interstate transportation of livestock, from confining the animals for a longer period than twenty-eight consecutive hours without unloading them in a humane manner into properly equipped pens for rest, feed and water for a period of at least five consecutive hours, unless prevented from doing

so by some accidental or unavoidable cause. The law further provides that the owner or agent in charge of any shipment may, by written request separate and apart from the shipping contract, extend the time for which the animals may be confined to a period of thirty-six hours.

In order to enable you to determine whether or not the negligence of the defendant above referred to caused the death of or injury to, any of the cows, you may also take into consideration all evidence with reference to the previous history and condition of the said cows, the climatic conditions, where they were raised and shipped from, their physical condition at the time of shipment, whether or not they had been well cared for and fed in Los Angeles, California, previous to such shipment, the condition of the weather with respect to temperature at the time they were shipped from Los Angeles and at the time they arrived at Yuma, the condition of the cattle when they arrived at Yuma before they were there unloaded, their ages and weights, the condition of their health and strength and all the other facts and circumstances of the trip surrounding and in any way affecting the class and condition of said cattle. It is claimed by the plaintiff that the cattle in question were loaded in defendant's cars the afternoon of July 3, 1913, at Los Angeles, California; that they were transported over defendant's line to the town of Yuma, in the State of Arizona, arriving at the latter place about [145—69] 10:00 o'clock, Mountain Time, or 9:00 o'clock, Pacific Time, the morning of July 4, 1913. As you know, there is a dispute be-

tween the parties as to the time the cattle left Los Angeles and as to the time they arrived at Yuma. Where there is a conflict in the testimony, it is the duty of the jury to reconcile that conflict if they can, so as to make all the witnesses speak the truth. If they cannot do so, then it is for them to determine which of the witnesses they will believe; in other words, the credibility and weight of the testimony is a matter exclusively within the jury's province.

It is also claimed by the plaintiff that upon the arrival of the train at Yuma the defendant company, through its agents, requested the plaintiff, who was accompanying said cattle, to unload the same for rest, feed and water; and that the plaintiff declined to unload said cattle at Yuma, giving as a reason that the cattle were in good condition and that it would seriously injure them or kill them to unload them in the hot sun into the uncovered pens and corrals of the defendant at Yuma.

Plaintiff further claims that he offered to execute and deliver to the defendant company a "written request," extending the period of time within which the cattle might be confined in the cars from twenty-eight to thirty-six consecutive hours. You have heard the testimony on that question—that subject, and I deem it my duty to pass upon the sufficiency of that offer or tender. I charge you as a matter of law that the plaintiff upon arrival of the cattle at Yuma had the right to tender to the defendant such written request for such extension of the time of confinement of the cattle in such cars; and that had he in fact so tendered such written request it would then have

been the duty of the defendant company to have transported the cattle on to Phoenix, Arizona, provided the [146—70] same could have been so transported and delivered at their destination within thirty-six hours from the time the train containing the shipment originally left Los Angeles, California. But, the plaintiff having failed to sign and tender such written request, the defendant company was required by the United States Statute to unload, feed, water and rest the said cattle at some point on its line of railroad within twenty-eight hours from the time the same left Los Angeles, California.

I further charge you that it was the duty of the defendant company to unload the cattle for feed, rest and water into pens properly equipped therefor. The statutes of the United States make it the duty of the railroad company to do that. You have heard all the evidence in the case, and it is for you and you alone to determine whether or not the corrals and pens provided by the defendant company at Yuma were such as the law requires railroads to furnish for the proper unloading, feeding and resting and watering of cattle. I say for the proper unloading, feeding, and resting and watering of the cattle. In passing upon this question, you may take into consideration the season when the cattle arrived at Yuma, the climatic conditions thereat at the time, and all of the other facts and circumstances in the case. In this same connection, you may also determine whether or not there was on said 4th day of July, 1913, any other place or station on defendant's line which the train carrying these cattle, and operating on its usual

schedule, could have reached within the twenty-eight hour period, at which the cattle could have been unloaded, fed, watered, and rested under conditions more favorable than existed at said town of Yuma on July 4, 1913. If you find from the evidence that the defendant had other corrals on its line [147—71] of road and in the direction in which plaintiff's shipment was moving, into which plaintiff's cattle could have been unloaded within the twenty-eight hour period and in a more humane manner than by unloading at Yuma under the circumstances developed in this case, then it was the defendant's positive duty to transport said cattle to such station for unloading.

If you find that the corrals or stock pens of the defendant company at Yuma were "properly equipped for the unloading of cattle for feed, water and rest," and that said company used due diligence in the unloading, handling and care of the stock at Yuma, then the defendant would not be liable to the plaintiff for any loss or injury to any of the said cattle.

On the other hand, if you find that the said corrals or stock-pens of the defendant company at Yuma were not properly equipped for the unloading of cattle for feed, water and rest, or that the stock were not humanely handled at Yuma, by the defendant company, its employees, or agents, and further believe from the evidence that as a result of such improperly equipped stock-pens, or of such inhumane handling of said cattle, any of them died or were injured, then and in that event, the defendant would be liable in damages for the value of such of the cattle

as died, not exceeding, however, the sum of thirty dollars per head for each animal so dying, and also for any injury which may have been caused to any of the remaining cattle, not exceeding the sum of twenty dollars per head for each animal so injured. In other words, in order that you may understand, at the time the plaintiff delivered the cattle to the defendant company at San Luis Obispo, California, to be transported to Phoenix, Arizona, he executed a contract in writing, by the terms of which he placed a valuation of thirty dollars per head on said cattle and in which contract or agreement he agreed [148—72] “That the amount to be by him claimed for each animal . . . so lost or damaged shall be adjudged on basis of value at time and place of shipment, not exceeding the declared value as hereinbefore set forth . . . and in no event is there to be any recovery . . . for any loss of or damages to said livestock, from whatsoever cause arising in excess of the declared value hereinbefore set forth.” The defendant company also pleads that notwithstanding the fact that it may have been guilty of negligence in the particulars set out in the complaint, nevertheless the plaintiff in this case cannot recover, because the contract heretofore referred to (and which was signed by the plaintiff, and by Mr. Ford, and Mr. Whitten, on behalf of the plaintiff, who were thereunto duly authorized) provides that the “second party hereby further agrees that in case of any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by the second party on the freight claim agent

of the first party in writing within ten days after unloading of the livestock; and that in event of failure so to do, all claims for loss or damages in the premises are hereby expressly waived, released and made void” Defendant alleges that no claim for loss or injury to said cattle was presented to it, or any of its agents or employees within the ten-day period. If you find this to be true, then, of course, the plaintiff cannot recover, unless you further find that the defendant waived this provision of the contract, or that the plaintiff was relieved from a compliance therewith as is hereinafter stated. The plaintiff in reply to this contention, that the claim should have been presented in writing within ten days after the unloading of the livestock, alleges that he was relieved from compliance with the above-quoted provision in that “on the 4th day of [149—73] July, 1913, and at all times subsequent to the arrival of said cattle at . . . Yuma. (I say subsequent to the arrival of at Yuma), the defendant had full knowledge and notice of the injuries and damages to plaintiff’s cattle as set forth in its said complaint; that said cattle were unloaded by the defendant into its stock-pens at the station of Yuma between the hours of 9 and 10 o’clock A. M., on the 4th day of July, 1913, and between said dated and the hour of 7:30 P. M. of said day, and prior to the reloading of the cattle into defendant’s cars, five of said cows died . . . That upon reloading the said cattle it became necessary to provide, and the defendant did provide, an additional car in which to ship thirteen

of the crippled and sick cattle of the plaintiff to their destination at Phoenix; that at various points between said station of Yuma and the city of Phoenix the train officials in charge of said shipment received telegraphic inquiries from other officials of the defendant inquiring as to the condition and welfare of said shipment; that upon the arrival of said shipment at Phoenix, Arizona, one of said crippled animals remained in defendant's car for a period of more than a week; and that immediately after the unloading of said shipment at Phoenix, Arizona, and almost daily from said date until the 21st day of October, 1913, the plaintiff and the agents of the Arizona Eastern Railroad Company and of this defendant were in communication relative to the damages sustained by the plaintiff; that the nature and extent of the injuries to the plaintiff's cows which arrived at the destination alive, were such as to render it impossible for the plaintiff, or any person else in the exercise of due care and diligence, to determine the amount and extent of damage sustained by the plaintiff within the said ten-day period; that a number of said cattle [150—74] died many days after their arrival at Phoenix, Arizona, as the result of such injuries . . . that the defendant has on many occasions prior to the 21st of October, 1913, recognized plaintiff's right to recover in some amount on account of his damages, sustained, as set forth in his said complaint, and has on many occasions attempted to settle and compromise said claim with the plaintiff." I repeat these allegations of the reply in order to show what the plaintiff claims is his reason or

excuse for not having presented his claim in writing to the defendant company or its agents within ten days from the date of such loss or injury, as is provided by the contracts.

I charge you as a matter of law that if you believe the defendant or its agents or employees did know that five or more of the cattle died while in transit, and also believe that the defendant was negotiating with the plaintiff for a settlement of his claim, and that the defendant knew that the cattle had been injured as alleged in plaintiff's complaint, then the plaintiff was relieved and released from the giving of such notice of loss or injury within ten days as required by the provisions of said contracts. The written contracts introduced in evidence limit the liability of the defendant company to thirty dollars for each animal injured or killed, and if you find for the plaintiff you should assess the damages at not exceeding thirty dollars per head for the cattle killed and not exceeding twenty dollars per head, the amount claimed in plaintiff's complaint, for the injury caused to each of said cattle by the defendant's negligence. The measure of damages in case of injury to the cattle under the contract is the amount of actual damages to each of said cattle so injured, resulting from the negligence of the defendant, its agents or employees, in no case to exceed twenty dollars per head. The measure of [151—75] damages as to those that were killed is not exceeding thirty dollars per head. A shipper will not be heard to claim or recover for damages or loss, however

great, in excess of the amount claimed in the bill of lading as the agreed value; nor will the carrier be allowed to deny liability for actual damages up to that amount, except, as in this case, where a less amount is claimed in the complaint, which in this case is twenty dollars per head for each of the cattle injured and not killed. The carrier must respond for negligence up to that value, but no further. If you come to the conclusion that the plaintiff is entitled to recover some damages, then, as I have heretofore stated, the measure of his damages for the eleven head of cattle that died, if you believe they died as a result of the defendant's negligence, would be not exceeding thirty dollars per head, and the measure of damages for the cattle that were injured by reason of the defendant's negligence would be the difference between the market value of the said cattle in their normal condition after making the trip from San Luis Obispo, California, to Phoenix, Arizona, and the condition in which they were actually delivered at Phoenix, but in no event can such injury or damage to each cow be placed at a figure in excess of twenty dollars; in other words, in arriving at the damages, if any, to be awarded to the plaintiff by reason of the cattle injured, if any, through the negligence of the defendant company, the measure of such damages will be the depreciation in the market value of the cattle by reason of such injury or injuries, such damages, in no event, however, to exceed the sum of twenty dollars per head. If you believe that eighty-seven head of the plaintiff's cattle or any

lesser number were damaged as set forth in plaintiff's complaint, and as a result of the negligent handling and transportation of the [152—76] cattle by defendant, you may award the plaintiff damages in a sum not exceeding twenty dollars per head, the amount alleged in plaintiff's complaint, and I further instruct you that in arriving at the damage suffered by the plaintiff you may consider the market value of cattle in their normal and healthful condition, of the grade and quality of plaintiff's cattle in the Salt River Valley at the time the injuries to his cattle were sustained, and you may then consider the price for which plaintiff sold his cattle in their injured condition, if you find from the evidence that the cattle were injured, and the difference in their market value in their normal condition and their value in their injured condition is a proper measure of plaintiff's damages, as I said before, not exceeding twenty dollars per head for the cattle injured.

If, under all the facts of this case and the law as I have stated it to you, you come to the conclusion that the plaintiff is entitled to recover some amount as compensation for the loss of, or injury to, his said cattle, you must *no* render what is known as a "quotient verdict"—that is, you must not add together the amount of the sums which each of you believes the plaintiff is entitled to, and divide by twelve, or any other number. Such or any similar method of arriving at plaintiff's compensation, would be unlawful, and the Court would be compelled to set aside the verdict.

If, under the rules I have stated, you find that the plaintiff is entitled to recover in this action, the amount of the recovery, if any, is for you to determine from all the facts in the case and under the limitations which the law imposes, as already stated to you. It is for you to say, in the exercise of a sound discretion, from all the facts in the case, without fear and without favor, without passion or prejudice, [153—77] what amount of damages, if any, should be awarded.

You are further instructed, as a matter of law, that plaintiff is not entitled to recover anything in this action, from defendant, for punitive or exemplary damages, but only damages for the death or loss of the cattle that died not exceeding thirty dollars per head and the injury to the eighty-seven head not exceeding twenty dollars per head, and you may, if you think proper, and if you find for the plaintiff,—find that the defendant was negligent in the manner set forth in plaintiff's complaint—also assess the sum of twenty dollars expended by the plaintiff, if you believe it was so expended, in the nursing and caring for the cattle in question.

Some testimony has been introduced with reference to the failure of the plaintiff to pay the freight charges on the cattle upon their arrival at Phoenix. I do not see how this question or this testimony affects the question as to whether or not the defendant company was guilty of negligence in the manner as alleged in plaintiff's complaint, although this testimony was introduced without objection of counsel; and if you believe that the defendant was negligent,

under the definition of that term, in the handling of the cattle, and believe that the plaintiff is entitled to recover, then you will render a verdict for the plaintiff, notwithstanding the fact, if it be a fact, that upon the arrival of the cattle at Phoenix, the plaintiff did not pay the freight charges before taking possession of the cattle. In other words, gentlemen, I think that is an issue to be tried in another lawsuit and not in the one now being tried.

If you find for the plaintiff, the form of your verdict will be, "We, the jury, duly empanelled and sworn in the above-entitled cause, upon our oaths, do find for the plaintiff and [154—78] assess his damages at . . . dollars," inserting the amount which you determine should be awarded him.

If you find for the defendant, the form of your verdict will be, "We, the jury, duly empanelled and sworn in the above-entitled cause, upon our oaths do find for the defendant."

After you have retired to your jury-room, you will select one of your number as foreman, and after you have arrived at a verdict, if you arrive at one, you will cause your foreman to sign the verdict which represents your conclusions, and return it into court. During the progress of this case you have been allowed to separate. From now on, you will be kept together in charge of the bailiff, during which time you should not communicate the state of your deliberations to anyone, not even to the bailiff, nor to the Court, nor to anyone at all. What transpires in your room should be kept secret until your verdict is returned to the Court, if you arrive at one, or until you

are discharged by order of the Court. Should you fail to arrive at an agreement within a reasonable time, the Court will endeavor to have provision made for your luncheon being furnished you.

[Defendant's Exception to Action of Court in Refusing to Give Certain Instructions.]

THEREUPON, and before the jury retired, the defendant excepted to the action of the Court in refusing to give each of the defendant's instructions numbers 1 to 20, and also excepted to the action of the Court in giving plaintiff's requested instructions, as follows:

"6. If you believe that eighty-seven of the plaintiff's cattle or any lesser number were damaged as set forth in plaintiff's complaint and as a result of the negligent handling and transportation of his cattle by the defendant, you may award the plaintiff damages in a sum not exceeding twenty dollars per head, the amount alleged in plaintiff's complaint, [155—79] and I further instruct you that in arriving at the damage suffered by plaintiff, you may consider the market value of cattle in their normal and healthful condition, of the grade and quality of plaintiff's cattle in the Salt River Valley at the time the injuries to his cattle were sustained, and you may then consider the price for which plaintiff sold his cattle in their injured condition if you find from the evidence the cattle were injured, and the difference in their market value in their normal condition and their value in their injured condition, is a proper measure of plaintiff's damages.

"8. If you find from the evidence that the defendant had other corrals on its line of road and in the direction in which plaintiff's shipment was moving, into which plaintiff's cattle could have been unloaded within the twenty-eight hour period, and in a more humane manner than by unloading at Yuma under the circumstances developed in this case, then it was the defendant's positive duty to transport said cattle to such station for unloading."

THEREUPON, and before the jury retired, the defendant then and there excepted to that portion of the Court's charge with reference to transporting the cattle to another station than Yuma, as follows: "In this same connection you may also determine whether or not there was on said 4th day of July, 1913, any other place or station on defendant's line which the train carrying these cattle, and operating on its schedule, could have reached within the twenty-eight hour period, at which the cattle could have been unloaded, fed, watered and rested, under conditions more favorable than existed at said town of Yuma on July 4, 1913. If you find from the evidence that the defendant had other corrals on its line of road and in the direction in which plaintiff's shipment was moving, into which plaintiff's cattle could have been unloaded within the [156—80] twenty-eight hour period and in a more humane manner than by unloading at Yuma under the circumstances developed in this case, then it was the defendant's positive duty to transport said cattle to such station for unloading."

Upon the grounds that it was shown by the evidence that plaintiff abandoned his cattle at Yuma; that the defendant was not reasonably sure of being able to transport the cattle on to Gila or to any other station within the twenty-eight hour period; and upon the ground that it was better and more humane to unload the cattle at Yuma, as was done, than to transport them on to any other station; and upon the ground that it would have been a violation of the twenty-eight hour law, the Federal Statute, to have attempted to take them to any other station.

Defendant also then and there excepted to that portion of the Court's charge with reference to the defendant being liable for unloading the cattle into improper pens or for any other alleged negligent unloading of the cattle, upon the ground that it was the duty of plaintiff to care for said cattle and to assist in unloading and reloading said cattle, under the contracts made and entered into between plaintiff and defendant with reference to the shipment.

The defendant also then and there excepted to that portion of the Court's charge with reference to a certain clause in the shipping contracts in evidence, providing for the ten days' notice to be given by plaintiff to defendant of the alleged loss or damage claimed by plaintiff as to the eighty-seven head sued for in the complaint as follows: "The defendant company also pleads that notwithstanding the fact that it may have been guilty of negligence in the particulars set out in the complaint, nevertheless the plaintiff in this action cannot [157—81]

recover, because the contract heretofore referred to (and which was signed by the plaintiff, and by Mr. Ford and Mr. Whitten, on behalf of the plaintiff, who were thereunto duly authorized) provides that the 'second party hereby further agrees that in case of any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by the second party on the freight claim agent of the first party in writing within ten days after unloading of the livestock; and that in event of failure so to do, all claims for loss or damages in the premises are hereby expressly waived, released and made void.' Defendant alleges that no claim for loss or injury to said cattle was presented to it, or any of its agents or employes within the ten-day period. If you find this to be true, then, of course, the plaintiff cannot recover, unless you further find that the defendant waived the provision of the contract, or that the plaintiff was relieved from a compliance therewith as is hereafter stated. The plaintiff in reply to this contention, that the claim should have been presented in writing within ten days after the unloading of the livestock, alleges that he was relieved from compliance with the above-quoted provision, in that 'on the 4th day of July, 1913, and at all times subsequent to the arrival of said cattle at . . . Yuma—(I say, subsequent to the arrival of said cattle at Yuma), the defendant had full knowledge and notice of the injuries and damages to plaintiff's cattle as set forth in its said complaint; that said cattle were unloaded by the defendant into its stock-pens at the station of Yuma

between the hours of 9 and 10 o'clock A. M., on the 4th day of July, 1913, and between said dates and the hour of 7:30 P. M. of said day, and prior to the reloading of the cattle into defendant's cars, five of said cows died . . . That upon reloading the [158—82] said cattle it became necessary to provide, and the defendant did provide, an additional car in which to ship thirteen of the crippled and sick cattle of the plaintiff to their destination at Phoenix; that at various points between said station of Yuma and the city of Phoenix the train officials in charge of said shipment received telegraphic inquiries from other officials of the defendant inquiring as to the condition and welfare of said shipment; that upon the arrival of said shipment at Phoenix, Arizona, one of said crippled animals remained in defendant's car for a period of more than a week; and that immediately after the unloading of said shipment at Phoenix, Arizona, and almost daily from said date until the 21st day of October, 1913, the plaintiff and the agents of the Arizona Eastern Railroad Company and of this defendant were in communication relative to the damages sustained by the plaintiff; that the nature and extent of the injuries to the plaintiff's cows which arrived at the destination alive, were such as to render it impossible for the plaintiff or any person else in the exercise of due care and diligence, to determine the amount and extent of damage sustained by the plaintiff within the said ten-day period; that a number of said cattle died many days after their arrival at Phoenix, Arizona, as the result of

such injuries; . . . that the defendant had on many occasions prior to the 21st of October, 1913, recognized plaintiff's right to recover in some amount on account of his damages, sustained as set forth in his said complaint, and has on many occasions attempted to settle and compromise said claim with the plaintiff.' I repeat those allegations of the reply in order to show what the plaintiff claims as his reason or excuse for not having presented his claim in writing to the defendant company or its agents within ten days from [159—83] the date of such loss or injury, as is provided by the contracts. I charge you as a matter of law that if you believe the defendant or its agents or employees did know that five or more of the cattle died while in transit, and also believe that the defendant was negotiating with the plaintiff for a settlement of his claim, and that the defendant knew that the cattle had been injured as alleged in the plaintiff's complaint, then the plaintiff was relieved and released from the giving of such notice of loss or injury within ten days as required by the said provisions of said contracts."

Because it was not shown by the evidence that the defendant ever waived the giving of such notice, and because it is shown by the evidence that plaintiff knew within ten days after receiving the cattle at Phoenix that he had a claim for damages against the defendant, and that he knew or should have known the condition of the cattle at that time, and also on the ground that the defendant did not waive the giving of such notice by the negotiations testified to in the evidence as to a compromise.

The defendant also then and there excepted to that portion of the Court's charge with reference to the clause in the livestock shipping contracts in evidence providing for an agreed valuation of thirty dollars, and particularly in its application to plaintiff's claim of twenty dollars per head, alleged injuries and damages to the eighty-seven head mentioned and referred to in plaintiff's complaint, as follows: "The written contracts introduced in evidence limit the liability of the defendant company to thirty dollars for each animal injured or killed, and if you find for the plaintiff you should assess the damages at not exceeding thirty dollars per head for the cattle killed and not to exceed twenty dollars per head, the amount [160—84] claimed in plaintiff's complaint, for the injury caused to each of said cattle by the defendant's negligence. The measure of damages in case of injury to the cattle under the contract is the amount of actual damages to each of said cattle so injured, resulting from the negligence of the defendant, its agents or employees, in no case to exceed twenty dollars per head. The measure of damages as to those that were killed is not exceeding thirty dollars per head. A shipper will not be heard to claim or recover for damages or loss, however great, in excess of the amount claimed in the bill of lading as the agreed value; nor will the carrier be allowed to deny liability for actual damages up to that amount, except, as in this case, where a less amount is claimed in the complaint, which in this case is twenty dollars per head for each of the cattle injured and not killed. The carrier

must respond for negligence up to that value, but no further. If you come to the conclusion that the plaintiff is entitled to recover some damages, then, as I have heretofore stated, the measure of his damages for the eleven head of cattle that died, if you believe they died as a result of the defendant's negligence, would be not exceeding thirty dollars per head, and the measure of damages for the cattle that were injured by reason of the defendant's negligence would be the difference between the market value of the said cattle in their normal condition after making the trip from San Luis Obispo, California, to Phoenix, Arizona, and the condition in which they were actually delivered at Phoenix, but in no event can such injury or damage to each cow be placed at a figure in excess of twenty dollars; in other words, in arriving at the damages, if any, to be awarded to the plaintiff by reason of the cattle injured, if any, through the negligence of the defendant company, the measure of such damages will be [161—85] the depreciation in the market value of the cattle by reason of such injury or injuries, such damages in no event, however, to exceed the sum of twenty dollars per head. If you believe that eighty-seven head of the plaintiff's cattle or any lesser number were damaged as set forth in plaintiff's complaint, and as a result of the negligent handling and transportation of the cattle by defendant, you may award the plaintiff damages in a sum not exceeding twenty dollars per head, the amount alleged in plaintiff's complaint, and I further instruct you that in arriving at the

damage suffered by the plaintiff you may consider the market value of cattle in their normal and healthful condition, of the grade and quality of plaintiff's cattle in the Salt River Valley at the time the injuries to his cattle were sustained, and you may then consider the price for which plaintiff sold his cattle in their injured condition, if you find from the evidence that the cattle were injured, and the difference in their market value in their normal condition and their value in their injured condition is a proper measure of plaintiff's damages, as I said before, not exceeding twenty dollars per head for the cattle injured."

Upon the grounds that it was shown by the evidence that the said eighty-seven head of cattle were worth more than thirty dollars per head after having received the alleged injuries and after arrival at destination and because it is not proper to adjust the damages by taking the difference between the market value in their normal condition after arriving in the Salt River Valley and their value in which the cattle were delivered in Phoenix, and because it was provided in the contract that any loss or damage or injury for which the defendant might be liable should be adjusted upon the basis of the market value at the point of shipment, San [162—86] Luis Obispo, California, not exceeding the declared value of thirty dollars per head.

Defendant then and there also excepted to that portion of the Court's charge referring to the non-payment of the freight charges by plaintiff, as fol-

lows: "Some testimony has been introduced with reference to the failure of the plaintiff to pay the freight charges on the cattle upon the arrival at Phoenix. I do not see how this question or this testimony affects the question as to whether or not the defendant company was guilty of negligence in the manner as alleged in plaintiff's complaint, although this testimony was introduced without objection of counsel; and if you believe that the defendant was negligent, under the definition of that term, in the handling of the cattle, and believe that the plaintiff is entitled to recover, then you will render a verdict for the plaintiff, notwithstanding the fact, if it be a fact, that upon the arrival of the cattle at Phoenix, the plaintiff did not pay the freight before taking possession of the cattle. In other words, gentlemen, I think that is an issue to be tried in another lawsuit and not in the one now being tried."

Upon the ground that the contracts under which the cattle were shipped provided that the plaintiff was not entitled to receive from the railroad company and the railroad company was not bound to deliver to plaintiff any of his cattle without payment of the freight charges. [163—87]

Defendant's Exhibit No. 4.

(Copy of livestock shipping order contract and bill of lading executed by Frank R. Stewart, dated San Luis Obispo, July 1, 1913, covering 60 head of the cattle involved in the shipment.) [164—88]

Defendant's Exhibit No. 5.

(Being livestock shipping order contract and bill

of lading executed in the name of Frank E. Whitten, dated San Luis Obispo, California, July 1, 1913, which is identical with defendant's Exhibit No. 4, with the exception that it covered 62 head of cattle, shipped in two of the cars involved in this shipment.)

Defendant's Exhibit No. 2.

(Being livestock shipping order contract and bill of lading executed in the name of James Ford, dated San Luis Obispo, California, July 1, 1913; which is identical with defendant's Exhibit No. 4, with the exception that it covered 30 head of cattle shipped in one of the cars involved in this shipment.)

Defendant's Exhibit No. 6 [Night Letter—Frank R. Stewart to R. H. Fields, July 3, 1913].

“Western Union.

“Night Letter.

“Received at

195 GSO. 45 NL.

SP Colton, Cal. July 3, 1913.

R. H. Fields,

37 West Adams St., Phoenix.

Left Los Angeles on two forty-four at five thirty this evening. Expect to reach Yuma at eight in the morning and Maricopa six o'clock tomorrow evening. Will make the run without unloading. Arrange to have us taken up on passenger train tomorrow evening without fail.

FRANK R. STEWART

1227 a. m.” [165—89]

G. W. LUCE,

A. H. RISING,
GENERAL FREIGHT AGENT,
NORTHERN DIST. PACIFIC SYSTEM
SAN FRANCISCO, CAL.

SPECIAL AGREEMENT

Station July 1 - 1913

[illegible]

Please forward the following described Live Stock at declared valuation per head hereinafter set forth, and under conditions shown on back hereof, to be understood and accepted, and are hereby expressly made a part hereof and agreed to by the undersigned, and also subject to the conditions hereinafter more particularly set forth, all of which provisions and conditions have been read and understood by the undersigned, and the undersigned hereby certifies that the above described Live Stock is of the kind and quality of the Live Stock and of special value which is thus stated, and of divers other good and sufficient considerations, and the undersigned is hereby acknowledged.

Phoenix, Ariz

ML&T	14398
GH&SA	14673

[illegible]

Shipper

Witness..... **Frank R. Stewart**

Para

AGREEMENT made at the station and on the date above named, by and between Southern Pacific Company, hereinafter called first party, and the person whose signature appears above as shipper hereinafter called second party.

WHEREAS said party transporters live stock under certain rules, stipulations, and conditions as expressed in General Freight Department Circular C. P. D. No. 138-E, supplements hereto and reissues thereof, and known as Rules and Regulations governing the Transportation of Live Stock, and that such agreement is to be performed, and in accordance with which the agreement is made, and referred into, first party hereby undertaking to transport second party certain live stock hereinbefore described at the rate of \$ per and second party hereby undertaking to deliver said stock as follows: in so far as concerns car or cars in which transported, and waybill numbers described as follows: in so far as concerns car or cars in which transported, and waybill numbers described as follows: in so far as concerns car or cars in which transported, and waybill numbers described as follows:

*If but one animal in shipment, show rate "PER HEAD," if more than one, "PER LOT," except that when carload shipments are made the rate "PER CAR" may be shown.

[illegible][illegible]

It is hereby further understood and agreed by the second party that in case the said stock herein described be destined to any point on the railroad of first party, or to a point beyond the destination to which rate is named hereon, all common carriers engaged in the transportation of said live stock to destination, and the said stock shall have and enjoy the special privileges and exemptions heretofore accorded to first party, when the rate or rates charged by such common carrier or carriers are conditioned on agreement limiting carriers' liability thereon, provided, however, that the responsibility of first party, whether as common carrier or otherwise, shall cease and utterly determine upon arrival of said live stock at the station where the said live stock is to leave the road of first party in the course of transportation to final destination. Provided further that Southern Pacific Company is not to be liable for any loss, damage or delay arising from any act or omission of said Southern Pacific Company by initial carrier.

[illegible]

.....

T. F. DeLaney
Agent Southern Pacific Company.

ORIGINAL

SOUTHERN PACIFIC COMPANY PACIFIC SYSTEM

LIVE STOCK SHIPPING ORDER CONTRACT AND BILL OF LADING

SPECIAL AGREEMENT

Executed by _____
at _____ Station, Date _____ 191____
for _____ car _____ of _____ good for transportation of _____

Billing agent
stamp here.

From _____ to _____
when accompanying the stock herein described and not otherwise.
This Contract must be presented to Agent at _____ for renewal

RELEASE FOR MAN OR MEN IN CHARGE

In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract, without charge other than the sum stipulated therein, for the carriage of the live stock mentioned therein, the undersigned in charge do hereby, voluntarily, assume all risk of accident or damage to his (or their) person or property, and do hereby release and discharge the said carrier or carriers from every and all claim, liability and demand of every kind, nature and description, for or on account of any personal injury or damage of any kind sustained by the undersigned as in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise.

1	Signature of man in charge
2	
3	
4	
5	

(Agents will draw and through agents not made)

Witness _____

The man or men who may be entitled to return transportation free or at a reduced rate under carriers' rules in effect, published and posted as required by law, at time this contract was executed, will upon surrender of this contract to the carriers' agent, receive ticket or tickets for the return journey.

TIME OF LOADING

_____ 191____ Hour _____ m.
Hired at _____ Hour _____ m.
Date arrived _____ Hour _____ m.
Date dep't _____ Hour _____ m.

Name of Consignee _____

TIME OF ARRIVAL AT _____ (Destination) _____ 191____ Hour _____ m.

TIME OF UNLOADING

_____ 191____ Hour _____ m. Agent _____

VALUATION

Ordinary Live Stock will be received for transportation under the form of contract appearing upon the other side of this paper, subject to the following additional conditions: Shipments of Live Stock moving between points in Oregon will be received for transportation under the conditions of the "Low Value Live Stock Contract" and "Special Value Live Stock Contract."—(Uniform Live Stock Contract prescribed by the Railroad Commission of Oregon.) Rates as shown in the tariffs of this Company apply only on Ordinary Live Stock, that is, the actual and declared value of which does not exceed:

Each Horse or Pony (Gelding, Mare or Stallion), Mule or Jack.	\$100.00
Each Colt (under 1 year).	50.00
Each Ox, Bull or Steer.	50.00
Each Cow.	30.00
Each Calf.	10.00
Each Hog.	10.00
Each Sheep or Goat.	3.00
Range Cattle, each animal.	30.00

Values in excess of the foregoing will be considered extraordinary, and such Extraordinary Live Stock will be received and forwarded by this Company only under the form of Contract above mentioned and subject to increased charges as compared with Ordinary Live Stock, as follows:

When actual and declared value exceeds that of Ordinary Live Stock, as shown above, by

100 per cent or less, increase the charge on each	10 per cent
200 per cent or less, increase the charge on each	20 per cent
300 per cent or less, increase the charge on each	30 per cent
400 per cent or less, increase the charge on each	40 per cent
500 per cent or less, increase the charge on each	50 per cent
600 per cent or less, increase the charge on each	60 per cent
700 per cent or less, increase the charge on each	70 per cent
800 per cent or less, increase the charge on each	80 per cent
900 per cent or less, increase the charge on each	90 per cent
1000 per cent or less, increase the charge on each	100 per cent

Charge on animals of greater value in like proportion, but in no case will greater charge be made for other animals than for a horse of same valuation.

INSTRUCTIONS

Shippers or their agents must acquaint themselves with the rules and regulations governing the transportation of Live Stock as per O. P. D. Circular 188-E, supplements thereto and reissues thereof, and known as "Rules and Regulations Governing the Transportation of Live Stock," and the terms of said form of contract above mentioned.

ATTENDANTS

Attendants accompanying Live Stock to destination and returning under conditions and rules of this Contract and Bill of Lading, also Circular G. P. D. No. 188-E, supplements thereto and reissues thereof, will be cared for as follows:

With 1 carload of Live Stock 1 man may accompany free, but not return free.
With 2 to 5 carloads. 1 man may accompany and return free.
With 6 to 10 carloads. 2 men may accompany and return free.
With 11 or more carloads. 3 men may accompany and return free.
When more than one carload of stock is shipped account of one owner from different stations to one destination, on same train, man or men may accompany as per above, and will be entitled to return free as follows:

One man to the station where the second car was placed in train.
One additional man to the station where the sixth car was placed in train.

One additional man to the station where the eleventh car was placed in train.

Transportation will be furnished to persons in charge of sheep, Hogs, Goats and Calves in DOUBLE-DECK CARS ON BASIS OF TWO SINGLE-DECK CARS as equivalent to one double-deck.

RECEIPT

FOR THE

RETURN TRANSPORTATION

FURNISHED ORIGINAL OR SUBSTITUTED LIVE STOCK ATTENDANTS

Received Ticket, Form _____ No. _____ Date _____

1. _____ To _____

Signature _____

Slim	O Light Eyes O
Medium	O Dark Eyes O
Stout	O Light Hair O
Short	O Dark Hair O
Medium	O Gray Hair O
Tall	O Mustache O
Young	O Chin Beard O
Middle-Aged	O Side Beard O
Elderly	O Full Beard O
	O No Beard O

Received Ticket, Form _____ No. _____ Date _____

2. _____ To _____

Signature _____

Slim	O Light Eyes O
Medium	O Dark Eyes O
Stout	O Light Hair O
Short	O Dark Hair O
Medium	O Gray Hair O
Tall	O Mustache O
Young	O Chin Beard O
Middle-Aged	O Side Beard O
Elderly	O Full Beard O
	O No Beard O

Received Ticket, Form _____ No. _____ Date _____

3. _____ To _____

Signature _____

Slim	O Light Eyes O
Medium	O Dark Eyes O
Stout	O Light Hair O
Short	O Dark Hair O
Medium	O Gray Hair O
Tall	O Mustache O
Young	O Chin Beard O
Middle-Aged	O Side Beard O
Elderly	O Full Beard O
	O No Beard O

SUBSTITUTED ATTENDANT

Received Ticket, Form _____ No. _____ Date _____

_____ To _____

Signature _____

Slim	O Light Eyes O
Medium	O Dark Eyes O
Stout	O Light Hair O
Short	O Dark Hair O
Medium	O Gray Hair O
Tall	O Mustache O
Young	O Chin Beard O
Middle-Aged	O Side Beard O
Elderly	O Full Beard O
	O No Beard O

SUBSTITUTED ATTENDANT

In case it becomes necessary for one of the persons in charge to leave train en route, substituting another in his place, such substitution must be made in presence of the Agent at station at which it occurs, who will cancel original signature and description and see that those of the substitute are properly affixed.

Substitutes _____

At _____

_____ Agent _____

Slim	O Light Eyes O
Medium	O Dark Eyes O
Stout	O Light Hair O
Short	O Dark Hair O
Medium	O Gray Hair O
Tall	O Mustache O
Young	O Chin Beard O
Middle-Aged	O Side Beard O
Elderly	O Full Beard O
	O No Beard O

ORIGINAL

SOUTHERN PACIFIC COMPANY
PACIFIC SYSTEM
LIVE STOCK SHIPPING ORDER CONTRACT AND BILL OF LADING
SPECIAL AGREEMENT

Ordinary form of c moving b under th "Special" prescrib in the ta that is, l Each Col Each Ox, Each Cov Each Cal Each Hog Each She Range Co Values and such by this C and subj Stock, as When : Stock, as case will Charge 1000 p 900 p 800 p 700 p 600 p 500 p 400 p 300 p 200 p 100 p Stock, as

Entered by _____ Station, Date _____ 191____
car of _____ good for transportation of _____

Billings agent
stamp here.

When accompanying the stock herein described and not otherwise, to _____

Contract must be presented to Agent at _____ for renewal
RELEASE FOR MAN OR MEN IN CHARGE

In consideration of the carriage of the undersigned upon a freight train of carrier or carriers named in the within contract, without charge other than stipulated therein, for the carriage of the live stock mentioned therein, do hereby, voluntarily, assume all risk of accident or discharge and carrier or carriers from every and all claim, liability and demand of kind, nature and description, for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or by their employees or otherwise.

Signature of man (or men) in charge
(Agents will draw pen through spaces not used)
Witness

The man or men who may be entitled to return transportation free or at a reduced rate under carriers' rules in effect, published and posted as required by this contract was executed, will upon surrender of this contract to the carriers' agent, receive ticket or tickets for the return journey.

TIME OF LOADING

191____ Hour _____ m. _____

Loaded at _____

Hour _____ m. _____

Hour _____ m. _____

Name of Consignee _____

TIME OF ARRIVAL AT _____

(Destination) _____

191____ Hour _____ m. _____

TIME OF UNLOADING

191____ Hour _____ m. _____

Agent _____

**Defendant's Exhibit No. 7 [Portion of Train Sheet,
Dated July 4, 1913].**

(Being train sheet dated July 4, 1913. For the sake of brevity, abstracted and only that portion of said train sheet as is relevant herein included in this bill of exceptions, as follows:

“Second 244.

Ar Yuma 11:35 a. m.

L Yuma 12:40 p. m.

L Patio 12:50

L Dome 1:47

L Welton 2:24

L Mohawk 3:40

L Aztec 4:28

L Sentinel 5:55

L Piedra 6:05

Ar Gila 7:20

L Gila 7:50

L Estrella 9:44

Ar Maricopa 10:45 [167—90]

**[Order Granting Defendant Sixty Days to Prepare
and File Bill of Exceptions, etc.]**

*In the United States District Court for the District
of Arizona.*

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

MINUTE ENTRY OF ORDER.

Upon stipulation of counsel on both sides herein, it is ordered that the defendant be given sixty days from this date within which to prepare and file its bill of exceptions herein, and that stay of execution be granted to the defendant for the same period.
[168—91]

*In the United States District Court for the District
of Arizona.*

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

And now, in furtherance of justice and that right may be done, the defendant presents the forgoing as its bill of exceptions in this case and prays that the same may be settled and allowed and signed and certified by the Judge, as provided by law.

Dated this 15th day of December, A. D. 1915.

FRANCIS M. HARTMAN,

J. C. FOREST,

Attorneys for Defendant. [169]

*In the United States District Court for the District
of Arizona.*

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Notice of Filing Bill of Exceptions.

To the Above-named Plaintiff, and to P. H. Hayes,
Esq., Phoenix, Arizona, His Attorney:

You and each of you will hereby please take notice that the defendant in the above-entitled cause, desiring and intending to prosecute a writ of error from the judgment of the above-entitled court in the above-entitled cause entered on the 29th day of October, 1915, has prepared and this day filed in the office of the clerk of the above-entitled court, for presentation to the Honorable William H. Sawtelle, the Judge who tried the above-entitled case, its bill of exceptions, copy of which is this day served upon you.

Dated this 15th day of December, A. D. 1915.

FRANCIS M. HARTMAN,

J. C. FOREST,

Attorneys for the Defendant.

Service of the above and foregoing notice accepted and also receipt acknowledged for a copy of defendant's bill of exceptions therein referred to this 16th day of December, 1915.

HAYES & LANEY,

Attorneys for Plaintiff. [170]

*In the United States District Court for the District
of Arizona.*

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Order Settling Bill of Exceptions.

The foregoing bill of exceptions is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein.

Dated this 3d day of January, A. D. 1916.

WM. H. SAWTELLE,

Judge.

[Endorsements]: No. 142 — Phoenix. In the United States District Court for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Bill of Exceptions. Filed Jan. 11, 1916, at —M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [171]

*In the United States Circuit Court for the Ninth
Circuit.*

SOUTHERN PACIFIC COMPANY, a Corporation,
Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Assignment of Errors.

Now comes the Southern Pacific company, by its attorneys, and says:

That in the record and proceedings herein in the United States District Court for the District of Arizona there is manifest error, to the great prejudice of the Southern Pacific Company, in this, to wit:

1. That the said Court erred in sustaining the objection of counsel for defendant in error, plaintiff below, on the ground that the same was immaterial, to the following question propounded to the witness J. J. Casey, by counsel for plaintiff in error, defendant below: "Q. How do the cattle-pens of the Southern Pacific Company at Yuma compare with the cattle-pens in other places in Arizona and in the southwest that you have seen and observed?"

For the reason that said witness had already testified that he had resided in Arizona for thirty years and had been engaged in the cattle business and farming for twenty-five years; had had experience in shipping cattle into and out of Arizona and over the line of the Southern Pacific Company's railroad through the town of Yuma, and had seen and inspected the cattle-pens of the Southern Pacific Company at Yuma and had seen and inspected the cattle-pens in other places in Arizona and in the southwest used for the purpose of unloading and [172] feeding cattle in the course of transportation by railroad, and because the witness would have testified, if he had been permitted to do so, that the cattle-pens

of the Southern Pacific Company at Yuma, and being the cattle-pens in question in this lawsuit, were just as good and as properly equipped as other pens in Arizona and in the southwest used for unloading and feeding cattle in the course of transportation by railroads, and that the cattle-pens of the Southern Pacific Company at Yuma were properly equipped; and because said testimony was material in view of the allegations of plaintiff's complaint wherein he alleges that the cattle-pens of the said Southern Pacific Company at Yuma were not properly equipped; and for the reason that plaintiff in error, defendant below was not required to maintain at the said town of Yuma cattle-pens equipped any differently or any better than cattle-pens at other places in Arizona and in the southwest similarly situated. [173]

2. The Court erred in sustaining the motion made by counsel for defendant in error to strike out the answer made by the witness J. J. Casey, as follows: "Q. State whether or not those pens at El Paso, Texas, have any sheds over them for shade. A. No, sir; they have not."

For the reason that the witness had testified that he had shipped cattle through El Paso, Texas, by railroad; had unloaded cattle into the cattle-pens of the Southern Pacific Company at El Paso, Texas, and had also seen the cattle-pens at El Paso, Texas, of other railroad companies;

For the reason that the testimony was material in view of the issues raised by the pleadings, and in view of the contention of defendant in error that the

cattle-pens of the Southern Pacific Company at Yuma were not properly equipped because they did not have sheds over them. [174]

3. Said Court erred in sustaining the objection made by counsel for defendant in error, on the ground that the same was immaterial, to the following question propounded to the witness J. J. Casey by counsel for plaintiff in error: "Q. Please state whether or not the cattle-pens of the Southern Pacific Company at Yuma compared favorably or are practically the same with reference to there being no sheds for shade for the cattle as the cattle-pens of the railroads at Tucson, Bowie and Phoenix, Arizona, El Paso, Texas, and Indio, California, places similarly situated and having the same climatic conditions as Yuma, Arizona?"

For the reason that the witness would have testified in answer to said question, if he had been permitted to do so, and plaintiff in error expected to elicit from the witness in answer to said question that the cattle-pens of the Southern Pacific Company at Yuma compare favorably with and were equipped practically the same as the cattle-pens at the other places named and which were similarly situated and having the same climatic conditions as Yuma, Arizona, and that none of such pens at such other places, so similarly situated, had sheds over them for shade, and that the cattle-pens of the Southern Pacific Company at Yuma were properly equipped; and for the reason that said testimony was material in view of the issues raised by the pleadings,

and in view of the contention by defendant in error that said cattle-pens were not properly equipped because they did *no* have sheds over them for shade.

[175]

4. The Court erred in sustaining the objection made by counsel for defendant in error, on the ground that the same was immaterial, to a certain question propounded to the witness, Charles Davis, by plaintiff in error, as follows: "Q. Did you ever see any cattle-pens with sheds over them in this country?"

For the reason that the witness had testified that he had lived in and around Phoenix, Arizona, for all his life, about thirty-eight years, had shipped a great many cattle out of Arizona and into California, and through the town of Yuma; that he was familiar with the cattle-pens of the Southern Pacific Company at Yuma; and for the reason that the witness would have testified in answer to said question, if he had been permitted to do so, and plaintiff in error expected to elicit from said witness, by said question, that he had never seen any cattle-pens with sheds over them in this country; and for the reason that said testimony was material in view of the issues involved in the action and in view of the contention of defendant in error that the cattle-pens of the Southern Pacific Company at Yuma were not properly equipped because they did not have sheds over them.

[176]

5. The said Court erred in denying and refusing to grant the motion made by plaintiff in error, de-

fendant below, at the close of the testimony, for a directed verdict in its favor:

For the reason that it was necessary for plaintiff in error to unload the cattle at Yuma, in order to comply with the federal act known as the Twenty-eight Hour Law; and for the reason that plaintiff is basing his claim for damages in this action upon the fact that the cattle were unloaded at Yuma instead of transporting them on to Phoenix, Arizona, their destination.

For the reason that the defendant in error, plaintiff below, abandoned his said cattle at Yuma, upon arrival at that place and refused to have anything further to do with them and refused and neglected to care for said cattle.

For the reason that the evidence also showed that the defendant in error had taken proper care of said cattle at Yuma, Arizona, they would not have suffered any damage or injury.

For the reason that the evidence also showed that all of the alleged loss, injury and damage to said cattle was caused wholly and solely by the gross negligence, fault and want of care of the defendant in error himself.

For the reason that the undisputed evidence showed that if any loss, injury or damage occurred to said cattle the same was due to the fact that plaintiff caused said cattle to be shipped from a cool, moist climate, into an extremely hot and dry climate on the 4th of July, 1913.

For the reason that the undisputed evidence showed that if any loss or damage occurred to said

cattle, the same was due wholly and solely and entirely to the climatic conditions, for which plaintiff in error was not liable or responsible. [177]

For the reason that the undisputed evidence showed that the defendant in error, plaintiff below, knew at the time he shipped the cattle the climatic conditions then existing at Yuma, Arizona, and selected the time for such shipment, and for which plaintiff in error was not liable.

For the reason that the undisputed testimony showed that prior to or at about the time the cattle were shipped from San Luis Obispo, California, defendant in error made and entered into a contract in writing with plaintiff in error, wherein and whereby defendant in error specifically agreed that plaintiff in error should not be liable for any loss, injury or damage to said livestock resulting from heat or climatic conditions.

For the reason that the undisputed evidence showed that if any loss, injury or damage occurred to said cattle, the same was due wholly, solely and entirely to the heat and climatic conditions existing at the time at Yuma, Arizona.

For the reason that the undisputed evidence showed, and it was admitted by defendant in error that at the time of the shipment of said cattle from San Luis Obispo, California, he made and entered into a contract in writing to and with the plaintiff in error, wherein and whereby he specifically agreed and bound himself to load said livestock at point of shipment, unload and reload at resting places and to feed and water the same at his own expense and to

accompany and attend said livestock enroute and to destination; and wherein and whereby defendant in error specifically agreed to attend and care for said livestock during the course of such shipment; and for the reason that the undisputed evidence showed that the defendant in error failed and neglected and refused to attend and care for said cattle at said town of Yuma, the [178] place at which defendant in error is alleging his said cattle were injured and damaged by reason of having been unloaded for feed and rest.

For the reason that the evidence showed, and it was admitted by defendant in error, that he made and entered into a written contract, as above referred to, wherein and whereby, among other things, it was agreed by and between the parties that the plaintiff in error, the railroad company, was not required to deliver said cattle to the defendant in error at destination unless the transportation charges on the same were paid; and for the further reason that it was admitted by the defendant in error that he did not pay the transportation charges.

For the reason that the undisputed evidence showed that there was no negligence whatever on the part of plaintiff in error, defendant below, in the handling and transportation of said cattle.

For the reason that the evidence failed to show any negligence whatsoever on the part of plaintiff in error, defendant below, in the handling and transportation of said cattle. [179]

6. The Court erred in refusing to give the special

charge requested by plaintiff in error, as follows:

“1. If you believe from the evidence that at the time the cattle mentioned in plaintiff’s complaint, arrived at Yuma, Arizona, on the line of railroad operated by defendant, they had been confined in the cars approximately nineteen hours, without feed and rest, and that plaintiff did not tender to or file with defendant or any of its agents any written request separate and apart from any printed bill of lading or other railroad form, authorizing defendant to confine said animals in said cars for a period of thirty-six hours from the time they had been loaded into such cars; and that defendant could not or was not reasonably sure of transporting said animals from said town of Yuma, in said cars, to Phoenix, Arizona, the place of destination, without confining said animals in said cars for a longer period than twenty-eight hours, then your verdict should be in favor of the defendant.”

For the reason that the undisputed evidence showed that defendant in error did not tender to or file with plaintiff in error or any of its agents any written request, separate and apart from any printed bill of lading or other railroad form, authorizing plaintiff in error to confine said animals in said cars for a period of thirty-six hours from the time they had been loaded into such cars; and for the reason that the evidence showed that the plaintiff in error could not have transported said animals from the said town of Yuma, in said cars, to Phoenix, Arizona, the place of destination, without confining said

animals in the cars for a period longer than twenty-eight hours.

For the reason that the evidence showed that it was necessary for the plaintiff in error to unload said cattle at Yuma in order to comply with the Federal Act known as the Twenty-eight Hour Law.

[180]

7. The said Court erred in refusing the special charge requested by plaintiff in error, defendant below, as follows:

“4. If you believe from the evidence that at the time said animals arrived at Yuma, Arizona, they had been confined in the cars approximately nineteen hours without feed or rest, and that it was more humane and better for said cattle to unload them at Yuma for feed and rest than to transport them beyond that point and keep them confined in said cars, then your verdict should be in favor of the defendant.”

For the reason that the plaintiff in error introduced evidence at the trial tending to show that it was better for said cattle and more humane to unload them at Yuma for feed and rest than to have transported them beyond that point.

For the reason that one of the issues involved in said action was as to whether or not it was better for said cattle and more humane to unload them at Yuma for feed and rest than to transport them to any other point in said cars. [181]

8. The Court erred in refusing to give the special charge requested by plaintiff in error as follows:

“5. If you believe from the evidence that it was

less injurious to said animals to unload them at Yuma for feed and rest than to have kept them confined in said cars for nine hours or eighteen hours longer, then you should find for the defendant."

For the reason that one of the issues involved in the case was as to whether or not it was less injurious to such animals to unload them at Yuma for feed and rest than to have kept them confined in said cars for nine hours or eighteen hours longer.

For the reason that plaintiff in error, defendant below introduced evidence tending to show that it was less injurious to unload said animals at Yuma for feed and rest than to have kept them confined in said cars for nine or eighteen hours longer. [182]

9, The Court erred in refusing to give special charge requested by plaintiff in error, defendant below, as follows:

"6. If you believe from the evidence that plaintiff made and entered into with defendant the written contracts as pleaded by defendant, providing that in case of any loss or damage should be sustained to said animals in said shipment for which defendant would be liable, that plaintiff should make written demand on defendant within ten days after unloading said animals at destination; and that it was possible for plaintiff to have made such demand within such time, then you are instructed that plaintiff cannot recover for any loss or damage to any of the animals so delivered at destination; but you are further instructed that as to any animals that may have died in transit; or at destination while the same

were still in the possession of the railroad company, plaintiff was not required to give such notice.”

For the reason that it was admitted by defendant in error, plaintiff below, that he did make and enter into the contracts as pleaded by plaintiff in error, defendant below, and for the reason that defendant in error, plaintiff below, admitted that he did not make written demand upon plaintiff in error, defendant below, or any of its agents, within the ten days after the unloading of said animals at destination, for any claim for damages for injuries to the 87 head mentioned in plaintiff’s complaint; and for the reason that the evidence showed that it was possible for defendant in error to have made such demand within such time, as to said 87 head. [183]

10. That said Court erred in refusing to give special charge requested by plaintiff in error as follows:

“7. Defendant has pleaded that the animals mentioned in plaintiff’s complaint were transported by it and its connecting carrier under three certain contracts in writing, the execution of which contracts plaintiff has admitted.

“These contracts provide, among other things, that in case any loss or damage resulting to said animals in transporting same, for which defendant would be liable, the plaintiff would within ten days after unloading at destination, make written demand upon defendant therefor, and that in the event of failure to make such written demand within such time that all claims for such loss or damage were expressly waived and made void.

“You are instructed that such a provision is reasonable and that if it were possible for plaintiff to have given such notice within such time and he did not do so, then you are instructed that plaintiff cannot recover of defendant for any loss or damage to any of the animals delivered to him at destination; but that said provision as to such notice does not apply to any animals that may have died in transit or at destination before being taken away from unloading pens at destination.”

For the reason that the evidence showed that it was entirely possible for defendant in error to have given the notice referred to within the time mentioned in said contracts as to the 87 head for which defendant in error is claiming damages by reason of the alleged injuries. [184]

11. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

“8. If you believe from the evidence that any of the animals mentioned in plaintiff’s complaint died within ten days after unloading at destination, and that plaintiff did not make written demand upon defendant or any of its agents within ten days after such unloading for loss or damage to such animals, then you are instructed that plaintiff cannot recover anything for such animals.”

For the reason that plaintiff below, defendant in error, admitted that he made and entered into the contracts above mentioned and also admitted that he made no written claim upon plaintiff in error, or any of its agents, within ten days after the delivery of

said cattle at destination, and for the reason that if any of said cattle died within ten days after delivery the plaintiff below, defendant in error, by not making any such claim within such time, thereby waived any and all claims therefore as to such animals.

[185]

12. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

“9. If you believe from the evidence that plaintiff knew, or could have known by the exercise of reasonable diligence, within ten days after unloading said animals at destination, that eight-seven head of said animals were injured or damaged in the sum of twenty dollars per head, as alleged by plaintiff, and plaintiff did not, within ten days after unloading said animals at destination, make written demand upon defendant or any of its agents for such alleged loss or damage, then you are instructed that plaintiff cannot recover for such alleged loss or damage.”

For the reason that the testimony of plaintiff himself shows that he knew within ten days after unloading said animals at destination that he had an alleged claim for the *eight-seven* head of animals referred to, that he refused to pay the freight charges at destination, giving as a reason therefor, his alleged claim, and the evidence also shows that he knew or could have known by the exercise of reasonable diligence, within ten days after the unloading of said animals at destination, whether or not he had a claim for damages to said eighty-seven head; and for the reason that the question as to whether or not defend-

ant in error knew or could have known by the exercise of reasonable diligence within ten days after the unloading of said animals at destination, whether or not he had a claim for damages to the eighty-seven head was one of the issues involved in said case and should have been submitted to the jury. [186]

13. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

“10. If you believe from the evidence that plaintiff could, within ten days after unloading said animals at destination, have given written notice to defendant or any of its agents, of any of the loss or damage to any of the animals, for which plaintiff is seeking to recover, and that he did not give such notice within such time, then you are instructed that plaintiff cannot recover for any of the alleged loss or damage to said animals, for which he could have given such notice, but you are further instructed that plaintiff was not required to give such notice as to any animals that may have died in transit or at destination before being removed from unloading pens.”

For the reason that the undisputed testimony and the testimony of the defendant in error himself showed that he could have given written notice within ten days after unloading said animals at destination, to plaintiff in error or to some of its agents, of his alleged claim for damages to the eighty-seven head mentioned in the complaint, and for the reason that this was one of the issues of fact involved in the case and should have been submitted to the jury. [187]

14. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

“11. If you believe from the evidence that plaintiff, at the time said animals were delivered by him to defendant, at San Luis Obispo, California, for transportation by defendant, over its line of railroad and the line of railroad of its connecting carrier to Phoenix, Arizona, made and entered into the contract or contracts in writing, as set forth and pleaded by defendant, wherein and whereby it was agreed and stipulated by and between plaintiff and defendant that the agreed valuation of said animals was the sum of thirty dollars per head; and that plaintiff, by reason of said stipulation that the value of said animals was the said sum of thirty dollars per head, thereby obtained lower and cheaper freight rates for the transportation of said animals from San Luis Obispo, California, to Phoenix, Arizona, than would have been applicable to or assessed upon said shipment had a higher valuation been placed upon said animals; and that plaintiff by said contracts stipulated and agreed that in case any loss or damage should be sustained to said animals for which defendant would be liable, that the amount to be claimed by plaintiff for each of said animals, so lost or damaged should be adjusted on the basis of the value of such animals at the time and place of said shipment, to wit, on July 1st, 1913, at San Luis Obispo, California; not exceeding the declared and agreed value thereof, to wit, the sum of thirty dollars per head; and you further find that the loss

and damage to plaintiff's said animals, as alleged, was caused by the negligence of defendant as alleged by plaintiff, to wit, the unloading of said animals at Yuma, Arizona; then you are instructed that plaintiff cannot in any event, recover herein, any greater sum for the animals that died in transit [188] or before being removed from pens at destination, than the said sum of thirty dollars per head and the freight charges on same; and you are further instructed that plaintiff's claim for the animals alleged to have been injured in such transportation should be adjusted on a basis of said declared and agreed valuation of thirty dollars per head and the freight charges on same from San Luis Obispo, California, to Phoenix, Arizona; and that if said animals after delivery at destination to plaintiff were of the value of thirty dollars per head, and the freight charges on same from San Luis Obispo, California, to Phoenix, Arizona, plaintiff is not entitled to recover anything for any of said animals alleged to have been injured."

For the reason that it was shown by the undisputed evidence and by the admissions of defendant in error that the contracts were made and entered into as set forth in said requested instruction; that defendant in error thereby obtained a cheaper freight rate for the transportation of said animals than would have been applicable to or assessed upon said shipment had a higher valuation been placed upon said animals; that defendant in error agreed that in case any loss or damage be sustained to said animals for which plaintiff in error would be liable that the amount to be claimed by defendant in error

for each of said animals so lost or damaged should be adjusted on the basis of the value of such animals at the time and place of shipment, to wit, on July 1st, 1913, at San Luis Obispo, California, not exceeding the declared and agreed value thereof, to wit, the sum of thirty dollars per head: that the eighty-seven head for which defendant in error was claiming injuries or damages in the sum of twenty dollars per head were worth, after having received said alleged injuries, the sum of sixty-five [189] dollars per head, and were sold for the said sum of sixty-five dollars per head, and that defendant in error did not pay any freight charges on said animals for their transportation from San Luis Obispo, California, to Phoenix, Arizona.

And for the reason that under the law the defendant was not entitled to recover anything for the alleges injuries to the *eight-seven* head sued for if said eighty-seven head were worth sixty-five dollars per head after arrival at destination and after receiving said alleged injuries.

And for the reason that under the law defendant in error was not entitled to recover anything on account of the alleged injuries or damages to the eighty-seven head sued for if said animals were worth more than thirty dollars per head after arriving at destination and after receiving said alleged injuries.

For the reason that said requested instruction embodied the correct interpretation or construction of the livestock shipping contracts in evidence as to the adjustment of claims for damages for injuries to the

animals involved in said shipment. [190]

15. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

“15. If you believe from the evidence that the alleged loss and damage to plaintiff’s animals was due to any other cause than unloading them at Yuma, Arizona, then you are instructed that plaintiff cannot recover and your verdict should be in favor of the defendant.”

For the reason that plaintiff in error offered evidence tending to prove that said animals were poor and weak and in starved condition when shipped from San Luis Obispo, California, and for the reason that it was also shown by the undisputed evidence that any injury or damage suffered by said animals was caused by the heat and climatic condition and this question should have been submitted to the jury. [191]

16. The Court erred in refusing to give special instruction requested by plaintiff in error, as follows:

“16. If you believe that at the time plaintiff shipped his said animals from San Luis Obispo, California, they were in a poor, weak or starved condition, and that any of the loss or damage to said animals, as alleged by plaintiff, was due to the condition of said animals at the time they were so shipped then you are instructed that plaintiff cannot recover herein of defendant, for such loss or damage.”

For the reason that evidence was offered by plaintiff in error and admitted tending to prove that the said animals at the time they were shipped from San

Luis Obispo, California, were in a poor, weak and starved condition, and that one of said animals fell down on the way to the loading-pens at said place, and had to be helped into the cars, and said question should have been submitted to the jury. [192]

17. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

“17. If you believe from the evidence that plaintiff caused said cattle to be brought from a cool and moist climate into Arizona in July, and into an extremely hot and dry climate, and that plaintiff knew of the climatic conditions then existing in Arizona, and the place or places to which he caused said animals to be transported; and any of the alleged loss or damage to said animals was due to such climatic conditions, then you are instructed that plaintiff cannot recover of defendant for such loss or damage.”

For the reason that it was shown by the undisputed evidence and by the testimony of defendant in error himself that said animals were brought from a cool and moist climate into Arizona, in July, into an extremely hot and dry climate, and that defendant in error knew of the climatic condition then existing in Arizona, and at Yuma, and that he selected the time for transporting said animals; and for the further reason that the undisputed evidence showed that some if not all of the alleged loss, injury or damage was caused by such climatic conditions, and for the reason that said question should have been submitted to the jury. [193]

18. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

“18. You are instructed that if plaintiff failed or neglected to attend to unloading and loading his cattle at Yuma, or failed or neglected to properly care for his said cattle while they were at Yuma, and that any of the alleged loss or damage was due to such failure on the part of plaintiff to attend to and care for said cattle, that defendant is not liable therefor, and plaintiff cannot recover for any such loss or damage.”

For the reason that defendant in error (plaintiff below) by the livestock shipping contract made and entered into by and between him and plaintiff in error, absolutely agreed and bound himself to unload and reload said animals at resting places, and to feed and water said animals at his expense, and to accompany and attend and care for said animals en route and to destination.

And for the reason that the undisputed evidence showed, and which was admitted by defendant in error, that he (defendant in error) failed, neglected and refused to assist in unloading said cattle at Yuma, and failed, neglected and refused to attend to and care for said animals at Yuma, and abandoned the same.

And for the further reason that it was admitted by defendant in error's own witness, who was one of the caretakers of said animals accompanying said shipment for defendant in error, that if defendant in error had properly attended to said animals while at Yuma, and properly taken care of the same,

that none of said animals would have died.

And for the reason that it was shown by the undisputed evidence and by the admissions of defendant in error and of [194] *and of* his own witnesses and caretakers that at least some of the injury or damage was due to the failure and negligence of defendant in error to properly care for and attend to said animals at Yuma.

And for the further reason that said question should have been submitted to the jury. [195]

19. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

“19. You are instructed that plaintiff cannot recover of defendant for any loss or damage to his cattle resulting from heat or climatic conditions, and if you believe that the alleged loss or damage to plaintiff’s cattle was due to the heat at Yuma, or to the climatic conditions at that place, then your verdict should be in favor of the defendant.”

For the reason that the contracts in evidence specifically provided that defendant in error assumed all risk of loss or damage to said livestock, resulting from heat, or climatic conditions; that there was a sufficient consideration for such agreement; and for the reason that the undisputed evidence showed that the alleged loss and damage was due solely and entirely to the heat at Yuma and the climatic conditions at that place.

And for the reason that the undisputed evidence showed that plaintiff in error had nothing whatever to do with choosing the time of transporting said cattle, but that defendant in error himself selected

the time for such transportation; that defendant in error knew before he shipped said cattle of the climatic conditions then existing at Yuma, and in Arizona; that the weather and climatic conditions at that time at Yuma were extremely hot and dry; and that it would be injurious to said animals to ship them from a moist and cool climate, as then existed in and around San Luis Obispo, California, into Arizona and through Yuma, where there existed such an extremely hot and dry climate. [196]

20. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

“20. You are instructed that plaintiff cannot recover anything from defendant in this action on account of the alleged injuries and damage to the eighty-seven head of cattle mentioned in plaintiff’s complaint.”

For the reason that by the contracts in evidence it was provided that in case any loss, injury or damage should be sustained by said animals for which plaintiff in error would be liable that defendant in error should make written demand therefor upon plaintiff in error within ten days after unloading said animals at destination; and in the event of failure to give such notice within such time that all claims for loss or damage were expressly waived, released and made void.

And for the further reason that defendant in error admitted and it was shown by the undisputed evidence that no such notice was given within the time mentioned.

And for the reason that the evidence also showed

that it was entirely possible for defendant in error to have given such notice within the time.

And for the further reason that the contracts in evidence expressly provided that in the event any of said animals sustained any loss or damage for which plaintiff in error was liable that the amount to be claimed for each animal so lost or damaged should be adjusted on the basis of value at the time and place of shipment, to wit, July 1, 1913, at San Luis Obispo, California, not exceeding the declared and agreed value of thirty dollars per head, and that in no event would there be any recovery for any loss or damage to said livestock, from whatsoever cause arising in excess of the declared and agreed value of thirty dollars per head. [197]

And for the reason that the undisputed evidence showed and it was also admitted by defendant in error that all of the said eighty-seven head mentioned in the complaint and for which defendant in error was claiming twenty dollars per head for alleged injuries, were worth more than thirty dollars per head after arrival at destination and after having received said alleged injuries, to wit, that they were worth sixty-five dollars per head, and were sold by defendant in error after arrival at destination and after having received said alleged injuries for sixty-five dollars per head. [198]

21. The Court erred in giving the special charge requested by defendant in error, as follows:

“6. If you believe that eighty-seven head of plaintiff’s cattle or any lesser number were damaged as set forth in plaintiff’s complaint and as a result

of the negligent handling and transportation of his cattle by the defendant, you may award the plaintiff damages in a sum not exceeding twenty dollars per head, the amount alleged in plaintiff's complaint, and I further instruct you that in arriving at the damage suffered by plaintiff, you may consider the market value of cattle in their normal and healthful condition, of the grade and quality of plaintiff's cattle in the Salt River Valley at the time the injuries to his cattle were sustained, and you may then consider the price for which plaintiff sold his cattle in their injured condition if you find from the evidence the cattle were injured, and the difference in their market value in their normal condition and their value in their injured condition, is a proper measure of plaintiff's damages."

For the reason that by the contracts in evidence it was provided that in case any loss, injury or damages should be sustained by said animals for which plaintiff in error would be liable that defendant in error should make written demand therefor upon plaintiff in error within ten days after unloading said animals at destination; and in the event of failure to give such notice within such time that all claims for loss or damage were expressly waived, released and made void.

And for the further reason that defendant in error admitted and it was shown by the undisputed evidence that no such notice was given within the time mentioned.

And for the reason that the evidence also showed that it was entirely possible for defendant in error

to have given [199] such notice within the time.

And for the further reason that the contracts in evidence expressly provided that in the event of any of said animals sustaining any loss or damage for which plaintiff in error was liable that the amount to be claimed for each animal so lost or damaged would be adjusted on the basis of value at the time and place of shipment, to wit, July 1, 1913, at San Luis Obispo, California, not exceeding the declared and agreed value of thirty dollars per head, and that in no event should there be any recovery for any loss or damage to said livestock, from whatsoever cause arising in excess of the declared and agreed value of thirty dollars per head.

And for the further reason that the undisputed evidence showed and it was also admitted by defendant in error that all of the said eighty-seven head mentioned in the complaint and for which defendant in error was claiming twenty dollars per head for alleged injuries, were worth more than thirty dollars per head after arrival at destination and after having received said alleged injuries, to wit, that they were worth sixty-five dollars per head, and were sold by defendant in error after arrival at destination and after having received said alleged injuries for sixty-five dollars per head. [200]

22. The Court erred in giving the special charge requested by defendant in error, as follows:

“8. If you find from the evidence that the defendant had other corrals on its line of road and in the direction in which plaintiff’s shipment was moving, into which plaintiff’s cattle could have been unloaded

within the twenty-eight hour period and in a more humane manner than by unloading them at Yuma under the circumstances developed in this case, then it was the defendant's positive duty to transport said cattle to such station for unloading."

For the reason that the evidence showed that at the time the cattle arrived at Yuma they had been confined in the cars, without feed, water or rest for eighteen hours and fifty-five minutes; that they had been shipped from Los Angeles, California, to Yuma, Arizona, through a hot, dry, dusty, desert country; that the train carrying said cattle would necessarily have had to remain at Yuma, in the yard at that place, for the purpose of inspection, changing engines, changing crews, etc., for at least one hour before it could have departed from Yuma; that said train did actually remain at Yuma for one hour and fifteen minutes; that the next station on the line of plaintiff in error at which there were any cattlepens for unloading for feed and rest was Gila, a distance of 123 miles; that the schedule time of such a train, had the five cars of cattle remained in it, from Yuma to Gila was ten hours; that it would have taken said train ten hours to have made the run from Yuma to Gila if said five cars of cattle had remained in said train, which would have necessitated said cattle remaining in said cars, without feed, rest or water, for approximately thirty hours, and for a longer period than twenty-eight hours.

For the reason that the evidence showed that it was better [201] for the cattle and more humane to unload at Yuma than to have transported

them on any further.

For the reason that the evidence showed that plaintiff in error did not have other corrals or cattle pens on its line of road, in the direction in which the shipment was moving, into which said cattle could have been unloaded, which could have been reached by said train within twenty-eight hours from the time the cattle had been loaded in Los Angeles, California.

For the reason that the undisputed evidence showed and defendant in error admitted that he (defendant in error) abandoned said cattle at Yuma, and failed, neglected, and refused to attend to or care for them, and for the reason that it was the duty of defendant in error under the contracts in evidence to attend to and care for said cattle en route to destination."

[202—31]

The Court erred in charging the jury in the general charge, as follows: "In this same connection you may also determine whether or not there was on said 4th day of July, 1913, any other place or station on defendant's line which the train carrying these cattle, and operating on its schedule, could have reached within the twenty-eight hour period, at which the cattle could have been unloaded, fed, watered and rested, under conditions more favorable than existed at said town of Yuma on July 4, 1913. If you find from the evidence that the defendant had other corrals on its line of road and in the direction in which plaintiff's shipment was moving, into which plaintiff's cattle could have been unloaded within the twenty-eight hour period and in a more

humane manner than by unloading at Yuma under the circumstances developed in this case, then it was the defendant's positive duty to transport said cattle to such station for unloading."

For the reason that the evidence showed that at the time the cattle arrived at Yuma they had been confined in the cars, without feed, water or rest for eighteen hours and fifty-five minutes; that they had been shipped from Los Angeles, California, to Yuma, Arizona, through a hot, dry, dusty, desert country; that the train carrying said cattle would necessarily have had to remain at Yuma, in the yard at that place, for the purpose of inspection, changing engines, changing crews, etc., for at least one hour before it could have departed from Yuma; that said train did actually remain at Yuma for one hour and fifteen minutes; that the next station on the line of plaintiff in error at which there were any cattle-pens for unloading for feed and rest was Gila, a distance of 123 miles; that the schedule time of such a train, had the five cars of cattle remained in it, from Yuma to Gila was ten hours; that it would [203] have taken said train ten hours to have made the run from Yuma to Gila if said five cars of cattle had remained in said train, which would have necessitated said cattle remaining in said cars, without feed, rest or water, for approximately thirty hours, and for a longer period than twenty-eight hours.

For the reason that the evidence showed that it was better for the cattle and more humane to unload at Yuma than to have transported them any further.

For the reason that the evidence showed that plain-

tiff in error did not have other corrals or cattle-pens on its line of road, in the direction in which the shipment was moving, into which said cattle could have been unloaded, which could have been reached by said train within twenty-eight hours from the time the cattle had been loaded in Los Angeles, California.

For the reason that the undisputed evidence showed and defendant in error admitted that he (defendant in error) abandoned said cattle at Yuma, and failed, neglected and refused to attend to or care for them, and for the reason that it was the duty of defendant in error under the contracts in evidence to attend to and care for said cattle en route to destination. [204]

24. The Court erred in charging the jury in the general charge, as follows: "The defendant company also pleads that notwithstanding the fact that it may have been guilty of negligence in the particulars set out in the complaint, nevertheless the plaintiff in this case cannot recover, because the contract heretofore referred to (and which was signed by the plaintiff, and by Mr. Ford, and Mr. Whitton, on behalf of the plaintiff, who were thereunto duly authorized) provides that the 'second party thereby further agrees that in case of any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by the second party on the freight claim agent of the first party in writing within ten days after unloading of the livestock; and that in event of failure so to do, all claims for loss or damages in the premises are hereby expressly waived, released and

made void.' Defendant alleges that no claim for loss or injury to said cattle was presented to it, or any of its agents or employees within the ten-day period. If you find this to be true, then, of course, the plaintiff cannot recover unless you further find that the defendant waived this provision of the contract, *of* that the plaintiff was relieved from a compliance therewith as is hereinafter stated. The plaintiff, in reply to this contention that the claim should have been presented in writing within ten days after the unloading of the livestock, alleges that he was relieved from compliance with the above-quoted provision in that 'on the 4th day of July, 1913, and at all times subsequent to the arrival of said cattle at . . . Yuma—(I say, subsequent to the arrival at Yuma)—the defendant had full knowledge and notice of the injuries and damages to plaintiff's cattle as set forth in its said complaint; that said cattle were unloaded by the defendant [205] into its stock-pens at the station of Yuma between the hours of 9 and 10 o'clock A. M. on the 4th day of July, 1913, and between said dates and the hour of 7:30 P. M. of said day, and prior to the reloading of the cattle into defendant's cars, five of said cows died. . . . That upon reloading the said cattle it became necessary to provide, and the defendant did provide, an additional car in which to ship thirteen of the crippled and sick cattle of the plaintiff to their destination at Phoenix; that at various points between said station of Yuma and the city of Phoenix the train officials in charge of said shipment received telegraphic inquiries from other offi-

cial of the defendant inquiring as to the condition and welfare of said shipment; that upon the arrival of said shipment at Phoenix, Arizona, one of said crippled animals remained in defendant's car for a period of more than a week; and that immediately after the unloading of said shipment at Phoenix, Arizona, and almost daily from said date until the 21st day of October, 1913, the plaintiff and the agents of the Arizona Eastern Railroad Company and of this defendant were in communication relative to the damages sustained by the plaintiff; that the nature and extent of the injuries to the plaintiff's cows which arrived at the destination alive, were such as to render it impossible for the plaintiff, or any other person else in the exercise of due care and diligence, to determine the amount and extent of damage sustained by the plaintiff within the said ten-day period; that a number of said cattle died many days after their arrival at Phoenix, Arizona, as the result of such injuries. . . . That the defendant had on many occasions prior to the 21st day of October, 1913, recognized plaintiff's right to recover in some amount on account of his damages, sustained as set forth in his said complaint, [208] and has on many occasions attempted to settle and compromise said claim with the plaintiff.' I repeat those allegations of the reply in order to show what the plaintiff claims as his reason or excuse for not having presented his claim in writing to the defendant company or its agents within ten days from the date of such loss or injury, as is provided by the contracts.

“I charge you as master of law that if you believe the defendant or its agents or employees did know that five or more of the cattle died while in transit, and also believe that the defendant was negotiating with the plaintiff for a settlement of his claim, and that the defendant knew that the cattle had been injured as alleged in the plaintiff’s complaint, then the plaintiff was relieved and released from the giving of such notice of loss or injury within ten days as required by the said provision of said contracts.”

For the reason that the evidence showed that plaintiff in error had never waived the giving of such notice; that the defendant in error was not relieved from giving such notice; that it was entirely possible for defendant in error to have given the notice as to his alleged claim for damages to the eighty-seven head mentioned in the complaint within the ten days.

For the reason that defendant in error admitted he knew within the ten days that he had an alleged claim for damages as to said eighty-seven head, and that he knew or should have known within the ten days the condition of the cattle.

And for the reason that any negotiations that defendant in error may have had with plaintiff in error with reference to compromise or settlement did not constitute a waiver on the part of plaintiff in error of the provision in said contracts requiring written claim for loss or damage to be made within ten days after the animals were unloaded at destination.

[207]

25. The Court erred in charging the jury in the general charge, as follows: “The written contracts

introduced in evidence limit the liability of the defendant company to thirty dollars for each animal injured or killed, and if you find for the plaintiff you should assess the damages at not exceeding thirty dollars per head for the cattle killed and not to exceed twenty dollars per head, the amount claimed in plaintiff's complaint, for the injury caused to each of said cattle by the defendant's negligence. The measure of damages in case of injury to the cattle under the contract is the amount of actual damages to each of said cattle so injured, resulting from the negligence of the defendant, its agents or employes, in no case to exceed twenty dollars per head. The measure of damages as to those that were killed is not exceeding thirty dollars per head. A shipper will not be heard to claim or recover for damages or loss, however great, in excess of the amount claimed in the bill of lading as the agreed value; nor will the carrier be allowed to deny liability for actual damages up to that amount, except, as in this case, where a less amount is claimed in the complaint, which in this case is twenty dollars per head for each of the cattle injured and not killed. The carrier must respond for negligence up to that value but no further. If you come to the conclusion that the plaintiff is entitled to recover some damages, then, as I have heretofore stated, the measure of his damages for the eleven head of cattle that died, if you believe they died as a result of the defendant's negligence, would be not exceeding thirty dollars per head, and the measure of damages for the cattle that were injured by reason of the defendant's negligence would be the

difference between the market value of the said cattle in their normal condition after making the trip from San [208] Luis Obispo, California, to Phoenix, Arizona, and the condition in which they were actually delivered at Phoenix, but in no event can such injury or damages to each cow be placed at a figure in excess of twenty dollars; in other words, in arriving at the damages, if any, to be awarded to the plaintiff by reason of the cattle injured, if any, through the negligence of the defendant company, the measure of such damages will be the depreciation in the market value of the cattle by reason of such injury or injuries, such damages in no event, however, to exceed the sum of twenty dollars per head. If you believe that eighty-seven head of the plaintiff's cattle or any lesser number were damaged as set forth in plaintiff's complaint, and as a result of the negligent handling and transportation of the cattle by defendant, you may award the plaintiff damages in a sum not exceeding twenty dollars per head, the amount alleged in plaintiff's complaint, and I further instruct you that in arriving at the damage suffered by the plaintiff you may consider the market value of the cattle in their normal and healthful condition, of the grade and quality of plaintiff's cattle in the Salt River Valley at the time the injuries to his cattle were sustained, and you may then consider the price for which plaintiff sold his cattle in their injured condition, if you find from the evidence that the cattle were injured, and the difference in their market value in their normal condition and their value in their injured condition is a proper measure

of plaintiff's damages, as I said before, not exceeding twenty dollars per head for the cattle injured."

For reason that the contracts in evidence and referred to expressly provided that in the event any of said animals sustained any loss or damage for which plaintiff in error was liable that the amount to be claimed for each animal so lost [209] or damaged should be adjusted on the basis of value at the time and place of shipment, to wit, July 1, 1913, at San Luis Obispo, California, not exceeding the declared and agreed value of thirty dollars per head, and that in no event should there be any recovery for any loss or damage to said live stock from whatever cause arising in excess of the declared and agreed value of thirty dollars per head.

And for the reason that the undisputed evidence showed and it was admitted by defendant in error that all of the said eighty-seven head mentioned in the complaint and for which defendant in error was claiming twenty dollars per head for alleged injuries, were worth more than thirty dollars per head after arrival at destination, and after having received said alleged injuries, to wit, that they were worth sixty-five dollars per head and were sold by defendant in error after arrival at destination and after having received said alleged injuries for sixty-five dollars per head.

And for the reason that it was not proper to adjust the alleged damages by taking the difference between the market value, or what would have been their market value in their normal condition, and their

value in the condition in which the cattle were delivered at destination.

For the reason that said charge placed an erroneous construction and interpretation upon the terms of said contracts in the particulars above pointed out. [210]

26. The Court erred in charging the jury as follows: "Some testimony has been introduced with reference to the failure of the plaintiff to pay the freight charges on the cattle upon the arrival at Phoenix. I do not see how this question or this testimony affects the question as to whether or not the defendant company was guilty of negligence in the manner as alleged in plaintiff's complaint, although this testimony was introduced without objection of counsel; and if you believe that the defendant was negligent, under the definition of that term, in the handling of the cattle, and believe that the plaintiff is entitled to recover, then you will render a verdict for the plaintiff, notwithstanding the fact, if it be a fact, that upon the arrival of the cattle at Phoenix, the plaintiff did not pay the freight before taking possession of the cattle. In other words, gentlemen, I think that is an issue to be tried out in another lawsuit and not in the one now being tried."

For the reason that the contracts in evidence, under which the cattle were shipped, expressly provided that defendant in error was not entitled to receive from the carrier and the carrier was not bound to deliver to defendant in error any of said cattle without payment of the freight charges. [211]

WHEREFORE, by reason of the errors aforesaid,

the said Southern Pacific Company prays that the judgment rendered and entered in this action be avoided, annulled and reversed and that the said District Court of the United States for the District of Arizona be directed to grant a new trial of said cause.

FRANCIS M. HARTMAN,
J. C. FOREST,

Attorneys for Plaintiff in Error, Defendant in the
Court Below.

[Endorsements]: No. 142 (Phx.) In the United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Plaintiff in Error, vs. Frank R. Stewart, Defendant in Error. Assignment of Errors. Filed Dec. 18, 1915. George W. Lewis, Clerk. [212]

*In the United States District Court for the District
of Arizona.*

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

To the Honorable WILLIAM H. SAWTELLE,
Judge of the District Court Aforesaid:

Now comes the Southern Pacific Company, by its attorneys, and respectfully represents: That this action is brought by plaintiff to recover of defendant damages in the sum of three thousand six hundred

ninety-five dollars, for alleged loss and injury to a certain shipment of cattle made by plaintiff, on or about the 1st day of July, 1913, from the town of San Luis Obispo, California, over the line of railroad operated by the said Southern Pacific Company, the defendant, and over its connecting carriers, to the city of Phoenix, in the State of Arizona:

That on the 26th day of October, 1915, said cause came on for trial before the above-entitled court and jury duly empanelled:

That thereafter and on the 29th day of October, 1915, the said jury found a verdict against your petitioner and in favor of said Frank R. Stewart, plaintiff, for the sum of two thousand and ninety dollars, and upon said verdict a final judgment was entered on the said 29th day of October, A. D. 1915, against your petitioner, defendant in said action, and your petitioner feeling itself aggrieved by the said verdict and judgment [213] entered thereon as aforesaid, therefore petitions the Court for an order allowing it to prosecute a writ of error to the Circuit Court of the United States for the Ninth Circuit, under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue, that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at the city of San Francisco, in said Circuit, for the correction of errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by plaintiff in error, conditioned as the

law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

FRANCIS M. HARTMAN,
J. C. FOREST,

Attorneys for Defendant.

Allowed this — day of December, A. D. 1915.

Judge.

[Endorsements]: No. 142—Phoenix. In the United States District Court for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Petition for Writ of Error. Filed Dec. 18, 1915, George W. Lewis, Clerk. [214]

**[Order Allowing Writ of Error Fixing Amount of
Supersedeas Bond.]**

*In the United States District Court for the District
of Arizona.*

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Upon motion of Francis M. Hartman and J. C. Forest, Esquires, attorneys for defendant, and upon filing a petition for a writ of error and assignment of errors,

IT IS ORDERED that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein and that the amount of the supersedeas bond on said writ of error be and it hereby is fixed at three thousand (\$3,000) dollars and upon the filing of such bond and approval thereof by the Judge of this court that all further proceedings herein be suspended until the determination of said writ of error by said Circuit Court of Appeals.

Dated this 18th day of December, A. D. 1915.

WM. H. SAWTELLE,
Judge.

[Endorsements]: No. 142—Phoenix. In the United States District Court for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Order Allowing Writ of Error and Fixing Bond. Filed Dec. 18, 1915, George W. Lewis, Clerk. [215]

*In the United States District Court for the District
of Arizona.*

No. 142—PHOENIX.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Supersedeas Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: that we, Southern Pacific Company, a corporation, as principal, and Albert Steinfeld and Epes Randolph of the county of Pima, State of Arizona and district aforesaid, as sureties, are held and firmly bound unto Frank R. Stewart, in the full and just sum of three thousand dollars (\$3,000), to be paid to the said Frank R. Stewart, his administrators, executors or assigns, for the payment of which, well and truly to be made, we bind ourselves, our successors, assigns, executors and administrators, jointly and severally by these presents.

Signed and dated this 17th day of December, A. D. 1915.

WHEREAS, lately, at a regular term of the District Court of the United States for the District of Arizona, sitting at Phoenix, in said district, in a suit pending in said court between Frank R. Stewart, as plaintiff, and the Southern Pacific Company, a Corporation, as defendant, cause No. 142 on the law docket of said court, final judgment was rendered against said Southern Pacific Company, a corporation, for the sum of two thousand ninety dollars (\$2,090), with interest thereon at the rate of six per cent per annum from date thereof until paid; and the said Southern Pacific Company, a corporation, has obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment of said court in the said suit and a citation directed to said Frank

R. Stewart, [216] defendant in error, citing him to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California according to law, within thirty (30) days from the date hereof:

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said Southern Pacific Company, a corporation, shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

SOUTHERN PACIFIC COMPANY.

By T. H. WILLIAMS,

Its Superintendent.

ALBERT STEINFELD,
EPES RANDOLPH.

State of Arizona,
County of Pima,—ss.

Albert Steinfeld and Epes Randolph, being first duly sworn, each for himself and not one for the other deposes and says: That he is a resident and householder within the county of Pima, State of Arizona, and within the district aforesaid: That he is worth the sum of three thousand dollars, the amount specified in the foregoing bond, over and above all just debt and liabilities and exclusive of property exempt from execution and forced sale.

ALBERT STEINFELD,
EPES RANDOLPH.

Subscribed and sworn to before me this 17th day of

December A. D. 1915. My commission expires Feb. 19, 1916.

[Seal]

R. W. LANGWORTHY,

Notary Public, Pima County, Arizona.

Approved this 18th day of December, A. D. 1915.

WM. H. SAWTELLE,

Judge. [217]

State of Arizona,

County of Pima,—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify that Albert Steinfeld and Epes Randolph, the parties to this bond whose signatures are subscribed thereto are in my opinion good and ample security for the amount therein specified, and that they have property within the said county of Pima, State of Arizona, subject to execution, in excess of the amount of said bond; and that if the bond was presented to me for approval the same would be accepted and approved.

Witness my hand this 23d day of December A. D. 1915.

GEORGE W. LEWIS,

Clerk.

[Endorsements]: No. 142. Phoenix. In the United States District Court for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a corporation, Defendant. Supersedes Bond on Writ of Error. Filed Dec. 18, 1915. George W. Lewis, Clerk. [218]

*In the United States District Court for the District
of Arizona.*

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY a Corpora-
tion,

Defendant.

Praeipice for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon the writ of error heretofore sued out herein by the said Southern Pacific Company, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. The plaintiff's complaint.
2. The summons and return of service.
3. The defendant's second amended pleas and answer.
4. The plaintiff's reply to defendant's second amended pleas and answer.
5. The empaneling of the jury.
6. The defendant's motion for a directed verdict.
7. The verdict.
8. The judgment.
9. The minute entries of the trial.
10. The bill of exceptions.

11. The petition for writ of error.
12. The assignment of errors.
13. The supersedeas bond and approval.
14. The order allowing writ of error.
15. The original writ of error.
16. The original citation in error.
17. The praecipe.
18. The clerk's certificate.

the said transcript to be filed with the clerk of the Circuit Court of Appeals of the Ninth Circuit, at San Francisco, Calif., before January sixteenth, 1916.

FRANCIS M. HARTMAN,
J. C. FOREST,

Attorney for Plaintiff in Error. [219]

**[Admission of Service of Praecipe for Transcript of
Record.]**

*In the United States District Court for the District
of Arizona.*

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY a Corpora-
tion,

Defendant.

Service of the foregoing praecipe in the above-entitled action is hereby admitted and accepted this

20th day of December, A. D. 1915.

HAYES & LANEY,
Attorney for Frank R. Stewart,
Defendant in Error, Plaintiff Below.

[Endorsements]: No 142. In the United States District Court for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Praeceptum for Transcript. Filed Dec. 20, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [220]

*In the United States District Court for the District
of Arizona.*

No. 142 (PHOENIX.)

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY a Corpora-
tion,

Defendant.

**Order Under Rule 16, Section 1, Enlarging Time to
File Record and to Docket Case.**

On consideration of the application of George W. Lewis, the clerk of the District Court of the United States for the District of Arizona, and good cause appearing therefor,

IT IS ORDERED that the time within which the original certified transcript of the record in the above-entitled cause may be filed and within which the cause may be docketed with the clerk of the

United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and hereby is enlarged to and including the 18th day of February, A. D., 1916.

Dated at Phoenix, Arizona, this 14th day of January, A. D., 1916.

WM. H. SAWTELLE,

Judge of the United States District Court for the District of Arizona.

[Endorsements]: No. 142 (Phx.) In the United States District Court for District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Co., Defendant. Order Enlarging Time to File Transcript of Record and to Docket Cause. Filed January 14, 1916. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [221]

In the United States District Court, District of Arizona.

No. 142 (PHOENIX.)

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY a Corporation,

Defendant.

**Certificate of Clerk of United States District Court
to Transcript of Record.**

United States of America,
District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States

District Court for the District of Arizona, do hereby certify that the two hundred twenty-one (221) typewritten pages, numbered from one (1) to two hundred twenty-one (221), inclusive, constitutes a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause, and as is stipulated for by counsel of record herein, as the same remain of record on file in the office of the clerk of said District Court, and that the same constitutes the record on appeal from the judgment of said United States District Court for the District of Arizona, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid into my office by or on behalf of [222] the defendant for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905), for making typewritten transcript of rec- ord—686 folios at 30c per folio.....	\$205.80
Certificate of Clerk to Typewritten Tran- script of Record, 4 folios at 30c per folio	1.20
Seal to said Certificate.....	.40

\$207.40

I hereby certify that the above cost for preparing and certifying record, amounting to \$207.40, has been paid to me by Francis M. Hartman, Esquire, one of counsel for the defendant herein.

I further certify that I hereto attach and herewith transmit the original Writ of Error and Citation in this cause, the same being numbered from page two hundred twenty-four (224) to page two hundred twenty-nine (229), inclusive.

WITNESS my hand and the Seal of said District Court, affixed this 3d day of February, A. D., 1916, at Phoenix, Arizona.

[Seal]

GEORGE W. LEWIS,

Clerk.

By R. E. L. Webb,

Deputy Clerk. [223]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

SOUTHERN PACIFIC COMPANY a Corpora-
tion,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States to the Hon-
orable Judges of the District Court of the United
States for the District of Arizona, Greeting:

Because in the record and proceedings as also in

the rendition of judgment of the plea which is now in the said District Court before you, between the Southern Pacific Company, plaintiff in error, and Frank R. Stewart, defendant in error, a manifest error has happened to the damage of Southern Pacific Company, a corporation, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath happened shall be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, where said court is sitting, within thirty days [224] from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected the said United States Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 18th day of December, in the year of our Lord one thousand nine hundred and fifteen.

[Seal]

GEORGE W. LEWIS,
Clerk of the United States District Court for the District of Arizona.

Allowed this 18 day of December, A. D. 1915.

WM. H. SAWTELLE,

Judge of the District Court of the United States for
the District of Arizona. [225]

[Endorsed]: No. 142. (Phx.) In the United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. Frank R. Stewart, Defendant in Error. Writ of Error. Filed Dec. 18, 1915. George W. Lewis, Clerk. [226]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

SOUTHERN PACIFIC COMPANY, a Corporation,
tion,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Citation [on Writ of Error].

United States of America,—ss.

To Frank R. Stewart, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, State of California, on the 16th day of January, A. D. 1916, pursuant to writ of error filed in the office of the clerk of the United States District Court for the District of Arizona, wherein the Southern Pacific Company, a corporation, is plaintiff in error, and

Frank R. Stewart is defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected in order that speedy justice should be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 18th day of December, A. D. 1915.

WM. H. SAWTELLE,
United States District Judge for the District of
Arizona. [227]

[Admission of Service of Citation on Writ of Error.]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

SOUTHERN PACIFIC COMPANY, a Corporation,
Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error,

Service of the foregoing citation in the above-entitled action is hereby admitted and accepted this 20th day of December, A. D., 1915.

HAYES & LANEY,
Attorneys for Frank R. Stewart, Defendant in
Error. [228]

[Endorsed]: No. 142. In the United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. Frank R. Stewart, Defendant in Error. Citation. Filed Dec. 20, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb. Deputy. [229]

[Endorsed]: No. 2745. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. Frank R. Stewart, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed February 5, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

